160 U.S. 136

160-136

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~708~~. 378

THE UNITED STATES, APPELLANT,

vs.

BENJAMIN HEALEY.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 21, 1894.

(15592.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 708.

THE UNITED STATES, APPELLANT,

vs.

BENJAMIN HEALEY.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

BENJAMIN HEALEY
vs.
THE UNITED STATES. } No. 18122.

I. *Petition.—Filed October* 17, 1893.

The petition of Benjamin Healey states that he is a citizen of the Unitd States residing in the city of San Francisco, in the State of California; that on the 5th day of February, 1889, the claimant filed a declaration with the register and receiver of the United States land office at Visalia, California, stating his intention to reclaim a tract of land containing 639.20 acres, and described as section 30 of township 21 south, of range 19 east of Mount Diablo meridian, California, under the provisions of the act of March 3, 1877, known as the desert land act, by conducting water upon the same within a period of three years thereafter.

The petition States that the claimant was informed by the register and receiver of the said land office that the payment required by law to be made upon the filing of the said declaration for the said tract of
2 land was 50 cents per acre; and that the claimant, under the compulsion of the said officers, and knowing that unless the said sum was paid the said declaration would not be received by the said officers or their superiors in office, did pay into the hands of the said receiver the sum of $319.60, being 50 cents per acre upon the land contained in the said entry.

The petition further states that the claimant made final proof of the reclamation of the said land to the satisfaction of the said register and receiver within the period of three years from the date of filing the said declaration, and that the said final proof was accepted by the said officers; that thereupon the claimant was informed by the said officers that a final payment of $1,278.40, being $2 per acre, was required to be made by law upon the making of final proof; and that under the compulsion of the said officers and in the knowledge that unless the said payment was made the said entry would be cancelled, the claimant did pay into the hands of the said receiver the said sum of $1,278.40 in final payment upon the said land.

The petition further states that the sum required by law to be paid upon filing the said declaration was but 25 cents per acre, and that the sum required by law to be paid upon making final proof was but $1 per acre; that the said receiver turned over to the defendant, as part of the receipts of his said office, the said sums of $319.60 and $1,278.40 paid to him by the claimant, and that the defendant now retains and withhold, and has not repaid, the sum of $799 belonging to the claimant, contrary to conscience and good faith.

Wherefore the claimant prays judgment against the defendant in the sum of $799.

JAMES H. SPALDING,
EDWIN W. SPALDING,
Attorneys for the Claimant.

DISTRICT OF COLUMBIA,
County of Washington, ss:

Edwin W. Spalding, of said county, being duly sworn, deposes and says that he is one of the attorneys for the claimant; that no assignment or transfer of said claim or of any interest therein has been made; that the said claimant is justly entitled to the amount claimed therein from the United States, as deponent verily believes, after allowing all just credits and offsets, and he verily believes that the facts stated in said petition are true.

EDWIN W. SPALDING,
Attorney for the Claimant.

Sworn to and subscribed before me this 16th day of October, 1893.
FRANK B. MARLOW,
Notary Public.

3 II. *Traverse.—Filed January* 30, 1894.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

J. E. DODGE,
Asst. Atty. General.

4 III. *Findings of fact and conclusion of law.—Filed February* 19, 1894.

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

March 12, 1877, the Interior Department issued the following circular:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 12, 1877.

REGISTER AND RECEIVER,
U. S. Land Office:

GENTLEMEN: The following is the text of an act of Congress approved March 3, 1877, and entitled "An act to provide for the sale of desert lands in certain States and Territories:"

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be lawful for any citizen of the United States, or any person of requisite age, who may be

entitled to become a citizen, and who has filed his declaration to become such, and upon payment of twenty-five cents per acre, to file a declaration under oath, with the register and receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land, not exceeding one section, by conducting water upon the same, within the period of three years thereafter, provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres, shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.

"Said declaration shall describe particularly said section of land if surveyed, and if unsurveyed, shall describe the same as nearly as possible without a survey.

"At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him.

"*Provided*, That no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres, which shall be in compact form.

"SECTION 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

"SECTION 3. That this act shall only apply to and take effect in the States of California, Oregon, and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

5 The declaration specified in the first section of the act to be filed with the register and receiver must be under oath, and may be executed before either the register or receiver or the clerk of any court of record having a seal. It must set forth that the applicant is a citizen of the United States, or that he has declared his intention to become such, in which case a duly certified copy of his declaration of intentions to becom a citizen must be presented and filed. It must also set up that the appli cant has made no other declaration for desert lands under the provisions of this act, and that he intends to reclaim the tract of land applied for, not exceeding one section, by conducting water thereon within three years from the date of his declaration.

The declaration must also contain a description of the land applied for, by legal subdivision if surveyed, or if unsurveyed, as nearly as possible without survey, by giving with as much clearness and precision as possible the locality of the tract with reference to known and conspicuous landmarks of the established lines of survey, so as to admit of its being thereafter readily identified when the lines of survey come to be extended.

As preliminary to the filing of such declaration it must be satisfactorily shown that the land therein described is desert land as defined in the second section of the act. To this end you will require the testimony of at least two disinterested and credible witnesses, whose testimony you will reduce to writing in the usual manner; or the evidence may be furnished in the form of affidavits executed before the clerk of any court of record having a seal, the credibility of the witnesses to be certified by said clerk. The witnesses must clearly state their acquaintance with the premises and the facts as to the condition and situation of the land upon which they base their judgment. You are particularly enjoined to exercise great care as to the sufficiency of the proof upon this point in each case.

After this proof has been made to your satisfaction the receiver will receive from the applicant the sum of twenty-five cents per acre for the land applied for; the register will receive and file his declaration, and you will jointly issue, in duplicate, a certificate in the following form: *

"UNITED STATES LAND OFFICE,
"——— ———, ——— 18—.

"It is hereby certified that under the provision of the act of Congress approved March 3, 1877, entitled 'An act to provide for the sale of desert lands in certain States and Territories,' ——— ——— has this day filed in this office his declaration of intentions to reclaim the following-described tract of land, viz: ——— ———; that he has proven to our satisfaction that the said tract of land is desert lands, defined in the second section of said act, and that he has paid to the receiver the sum of ——— dollars, being at the rate of twenty-five cents per acre for the land above described. It is, therefore, further certified that if within three years from the date hereof the said ——— ———, or his assignee or legal representative, shall satisfactorily prove that the said land has been reclaimed by carrying water thereon, and shall pay to the receiver the additional sum of one dollar per acre for the land above described, he or she or they shall be entitled to receive a patent therefor under the provisions of the said act.

"———— ————, *Register.*
"———— ————, *Receiver.*"

You will deliver one copy of this certificate to the applicant, retaining the other copy with the declaration and proof. You will number the certificates in the order of their issue. The register will keep a record of the certificates issued, showing the number, date, amount paid, name of applicant, and description of the land applied for in each case, and, in addition, he will note the same upon his plats and records as in cases of ordinary entry. At the end of each month he will, with his regular returns, forward to this office an abstract of the declarations filed and cer-

* These words are here printed in italics for convenience of reference.

tificates issued under this act during the month, accompanying same with the declaration and proofs filed and the retained copy of certificate in each case.

The receiver will also account for the money received under this act in the usual form. At any time within three years after the date of filing the declaration and the issue of certificate the proper party may make satisfactory proof of having conducted water upon the land applied for.

This proof must consist of the testimony of at least two disinterested and credible witnesses, who must appear in person before the register and receiver. They must declare that they have personal knowledge of the condition of the land applied for and of the facts to which they testify; and their testimony shall be reduced to writing in the usual manner. You will also require the party to present and surrender the duplicate certificate issued when the declaration was filed.

6 When this is done, and the proof made to your satisfaction, the receiver will receive the additional payment of one dollar per acre, receipting therefor in duplicate in the usual manner, but indorsing upon the face of the receipt a reference to this act. The register will also issue a final certificate of purchase in the ordinary form of such certificates, indorsing also upon the face of the certificate a reference to this act. You will give to these final certificates and receipts a special series of numbers, and will make separate abstracts of same at the end of each month, sending up the final certificates, receipts, and proofs, as in cases of ordinary preemption entries.

In cases where declarations shall be filed under this act for unsurveyed lands, you will immediately forward copies of the declarations to the surveyor-general.

You will acknowledge receipt of this circular.

Very respectfully,

J. A. WILLIAMSON,
Commissioner.

II.

June 27, 1887, the following circular was issued by said Department:

DESERT LAND ENTRY—FINAL PROOF.

The first section of the act of March 3, 1877 (19 Stat., 377), entitled "An act to provide for the sale of desert lands in certain States and Territories," provides for the reclamation of such lands by "conducting water upon the same." The second section provides "that all lands exclusive of timber lands and mineral lands which will not, without artificial irrigation, produce some agricultural crop, shall be deemed desert lands within the meaning of this act," and the third section provides that "the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office." It is therefore prescribed as follows:

First. Lands bordering upon streams, lakes, or other natural bodies of water, or through or upon which there is any river, stream, arroyo, lake, pond, body of water or living spring, are not subject to entry under the desert land law until the clearest proof of their desert character is furnished.

Second. Land which produces native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop of hay in usual seasons is not desert land.

Third. Lands which will produce an agricultural crop of any kind, in amount to make the cultivation reasonably remunerative, are not desert.

Fourth. Lands containing sufficient moisture to produce a natural growth of trees are not to be classed as desert lands.

(1) The amount of land which may be entered by any one person under the desert land act can not exceed 1 section, or 640 acres, which must be in compact form, and no person can make more than one entry.

(2) Desert land entries are not assignable, and the transfer of such entries, whether by deed, contract, or agreement, vitiates the entry. An entry made in the interest or for the benefit of any other person, firm, or corporation, or with intent that the title shall be conveyed to any other person, firm, or corporation is illegal.

(3) *The price at which lands may be entered under the desert land act is the same as under the preemption law, viz: single minimum lands at* $1.25 *per acre, and double minimum lands at* $2.50 *per acre.* (*Sec.* 2357, *U. S. Rev. Stat.*) *

(4) A party desiring to avail himself of the privileges of the desert land act must file with the register and receiver of the proper district land office a declaration under oath, setting forth that the applicant is a citizen of the United States, or that he has declared his intention to become such. In the latter case a duly certified copy of his declaration of intention to become a citizen must be presented and filed. It must also be set up that the applicant has not previously exercised the right of entry under the provisions of this act, and that he intends to reclaim the tract of land applied for by conducting water thereon within three years from the date of his declaration. The declaration must also contain a description of the land applied for, by legal subdivisions if surveyed, or if unsurveyed as nearly as possible without a survey, by giving with as much clearness and precision as possible the locality of the tract with reference to the already established lines of survey, or to known and conspicuous landmarks, so as to admit of its being readily identified when the lines of survey come to be extended.

(5) Your attention is called to the terms of this declaration as provided by existing regulations (Form 4–274), which are such as require a personal knowledge by the entrymen of lands intended to be entered. The
7 required affidavit can not be made by an agent nor upon information and belief and you will hereafter reject all applications in which it does not appear that the entryman made the averments contained in the sworn declaration upon his own knowledge derived from a personal examination of the lands. The blank in the declaration, to wit, "that I became acquainted with the said lands by ———," must be filled in with a full statement of the facts of his acquaintance with the land and how he knows its character as alleged. Said declarations must be corroborated by the affidavits of two reputable witnesses who are acquainted with the land and with the applicant, and who must clearly state their acquaintance with the premises, and the facts as to the condition and situation of the land upon which they base their judgment. (Form 4–074.)

* These words are here printed in *italics* for convenience of reference.

(6) Applicants and witnesses must in all cases state their place of actual residence, their business or occupation, and their post-office address. It is not sufficient to name the county and State or Territory where a party lives, but the town or city must be named, and if residence is in a city the street and number must be given.

(7) The declaration and corroborating affidavits may be made before either the register or receiver of the land district in which the lands are situated, or before the judge or clerk of a court of record of the county in which the lands are situated, and if the lands are in an unorganized county, then the affidavit may be made in an adjacent county. The depositions of applicant and witnesses in making final proof must be taken in the same manner, and the authority of any practice or regulation permitting original or final desert land affidavits to be executed before any other officers than those named above is hereby revoked. The affidavits of applicant and witnesses must in every instance, either of original application or final proof, be made at the same time and place and before the same officer.

(8) When proof of the character of the land has been made as above required to the satisfaction of the district officers, the applicant will pay the receiver the sum of 25 cents per acre where the land is single minimum, and 50 cents per acre where the land is double minimum. The register will receive and file the declaration, and the register and receiver will jointly issue, in duplicate, a certificate (Form 4–199) acknowledging the receipt of the 25 or 50 cents per acre, as the case may be, and the filing of the declaration. One of these duplicates will be delivered to the applicant, the other will be retained by the register and receiver with the declaration and proof. They will bear a number according to the order in which the certificate was issued. The register will keep a record of the certificates issued, showing the number, date, amount paid, name of applicant, and description of the land applied for in each case, and, in addition, he will note the same upon his plats and records as in cases of ordinary entry. At the end of each month he will, with his regular returns, forward to the General Land Office an abstract of the declarations filed and certificates issued under this act during the month, accompanying the same with the declarations and proofs filed and the retained copy of certificate in each case. The receiver will also account for the money received under this act in the usual form.

(9) Surveys of desert land claims can not be made in advance of the regular progress of the public surveys. After a township has been surveyed the claim must be adjusted to the lines of the survey.

(10) Persons making desert land entries must acquire a clear right to the use of sufficient water for the purpose of irrigating the whole of the land and of keeping it permanently irrigated. A person who makes a desert land entry before he has secured a water right does so at his own risk, and as one entry exhausts his right of entry, such right can not be restored or again exercised because of failure to obtain water to irrigate the land selected by him.

(11) The source and volume of water supply, how acquired and how maintained, the carrying capacity of the ditches, and the number and length of all ditches on each legal subdivision of the land must be specifically shown. Applicant and witnesses must each state in full what has been done in the matter of reclamation and improvement and by whom, and must each answer fully and of their own personal knowledge the

questions propounded in the final proof depositions. They must state specifically whether they at any time saw the land effectually irrigated, for without knowledge thus derived the fact of reclamation remains a matter of conjecture. (Case of Charles H. Schick, 5 L. D., 151.)

(12) The whole tract and each legal subdivision for which proof is offered must be actually irrigated. If there are some high points or uneven surfaces which are practically not susceptible of irrigation, the nature, extent, and area of such spots must be fully stated. In this connection the right to the water used, the quantity of it, the manner of its distribution, and the permanence of the supply are all to be taken into consideration. (Case of Geo. Ramsey, 5 L. D., 120.)

(13) Before final proof shall hereafter be submitted by any person claiming to enter lands under the desert land act, such person will be required to file a notice of intention to make such proof, which shall be published in the same manner as required in homestead and preemptioncases.

8 (14) Contests may be instituted against desert-land entries for illegality or fraud in the inception of the entry, or for failure to comply with the law after entry, or for any sufficient cause affecting the legality or validity of the claim. Contestants will be allowed a preference right of entry for thirty days after notice of the cancellation of the contested entry, in the same manner as in homestead and preemption cases, and the register will give the same notice, and be entitled to the same fee for notice, as in other cases.

(15) When relinquishments of desert-land entries are filed in the local land office the entries will be cancelled by the register and receiver in the manner as in homestead, preemption, and timber-culture cases, under the first section of the act of May 14, 1880. (21 Stat., 140.)

(16) Nothing herein will be construed to have a retroactive effect in cases where the official regulations of this Department in force at the date of entry were complied with.

WM. A. J. SPARKS,
Commissioner.

Approved:
L. Q. C. LAMAR, *Secretary.*

III.

January 13, 1892, the Secretary of the Interior, in answer to a letter of the Commissioner of the General Land Office asking instructions on the subject, made the following ruling:

"After a careful consideration of this matter I have concluded that the amount of money to be paid in acquiring title to desert lands under said act of March 3, 1877, as amended by the act of March 3, 1891, is $1.25 per acre without regard to the situation of the land in relation to the limits of railroad grants."

In September, 1893, another Secretary of the Interior adhered to the latter ruling in the case of one White, who applied for refund of money overpaid by him. White, having filed May 20, 1891, his application to make an entry on land within the limits granted to a railroad, was required by the receiver to pay $2.50 an acre therefor. The Secretary held that:

"Under the facts in this case and the act of March 3, 1877, as amended by the act of March 3, 1891 (26 Stat. L., 1095), fixing the price of desert-

land entries at $1.25 per acre without regard to the situation of the land with relation to the limits of railroad grants, there is no question but that White was required to pay $400 too much for his land. And the only question before me for my consideration is, whether or not the Secretary of the Interior has the power to repay to White that $400 after it has found its way into the Treasury of the United States. As there is no statute in existence empowering the Secretary of the Interior to make repayment in cases of this character, your decision is affirmed."

IV.

February 5, 1889, the claimant filed with the register and receiver of the Vandalia land office a declaration of his intention to reclaim a tract of land situated in their said district, part of the alternate reserved sections along the line of the railroad and within the limits granted by the act of Congress of July 27, 1866, ch. 278 (14 Stat. L., 299), being on section 30, township 21 south, of range 19 east, of Mount Diablo meridian, California, containing 639.20 acres, and other facts required in such declaration by said act and the circular of March 12, 1877. At the same time, being so required, without protest and without taking any steps for relief against the demand of the receiver, he paid the sum of $319.60, which was 50 cents per acre for the land so described.

V.

September 21, 1891, the claimant made satisfactory proof to the register and receiver of the reclamation of said tract of land as provided by said statute and circulars, and, being so required, without protest and without taking any steps for relief against the demand of the receiver, he paid the sum of $1,278.40, which was $2 per acre for the land reclaimed in addition to the amount paid at the time of filing his declaration, in all, $2.50 per acre, and thereupon a patent was issued.

VI.

No part of said money has been refunded to the claimant.

CONCLUSION OF LAW.

Upon the foregoing facts the court decides as a conclusion of law that the claimant is entitled to recover the sum of $799.

9 IV.—*Opinion of the court.*

OPINION.

RICHARDSON, Ch. J., delivered the opinion of the court:

The first question arising in this case is whether or not the proviso of section 2357 of the Revised Statutes applies to the desert-land act of 1877, March 3, ch. 107 (1 Supp. to Rev. Stat., 2d ed., p. 137). The section is as follows:

"SEC. 2357. The price at which the public lands are offered for sale shall be one dollar and twenty-five cents an acre; and at every public sale the

highest bidder, who makes payment as provided in the preceding section, shall be the purchaser; but no land shall be sold, either at public or private sale, for a less price than one dollar and twenty-five cents an acre; and all the public lands which are hereafter offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry:

"*Provided*, That the price to be paid for alternate reserved lands, along the line of railroads, within the limits granted by any act of Congress, shall be two dollars and fifty cents per acre."

This section is reproduced from the act of 1820, April 24, chapter 51, section 3 (3 Stat. L., 566). At the time of the passage of that act the whole policy of the Government in relation to the disposal of public lands consisted in offering the lands at public or private sale for cash only. The second section of the act (now R. S., sec. 2356) expressly provided that credit should not be allowed for the purchase money of any of the public lands.

In 1841 Congress began to make other provisions for the disposal of such lands. By the act of 1841, September 4, chapter 16, section 10 (5 Stat. L., 455), it was provided that any citizen of the United States or any person who had declared his intention to become such, being the head of a family, or widow, or single man over the age of twenty-one years, who made settlement on such lands, inhabited and improved the same, and erected a dwelling thereon, might enter with the register of
10 the land office any number, not exceeding 160 acres, upon paying the minimum price therefor. (Now R. S., §§ 2257, 2258, 2259, 2260, 2261.) This was the first of the preemption laws.

Subsequently, in reserving lands in grants to railroads, Congress provided that the lands so reserved should not be sold for less than double the minimum price of the public lands when sold after having been offered for sale to the highest bidder. (10 Stat. L., ch. 45, § 3, p. 9, ch. 72, § 2, p. 302; 11 Stat. L., ch. 28, § 2, p. 9, ch. 31, § 2, p. 16, ch. 41, § 2, p. 17, and other acts.) From these acts came the use of the phrase, "double minimum lands."

In 1862 Congress adopted the policy of disposing of public lands to citizens who entered thereon for the purpose of obtaining homesteads. (Act of 1862, May 20, ch. 75, and subsequent acts, now R. S. §§ 2289–2317.) These acts make special provisions on the subject, different from those existing in 1820 in relation to the sale of public lands.

They allowed an entry to be made on payment of $5 where the quantity of land was less than 80 acres, and $10 where it was more than 80 acres. (R. S. § 2290.) At the end of five years, upon proof that the person making such entry has resided on or cultivated the land for the term of five years immediately previous thereto, and upon making affidavit of other facts as therein specified, he is entitled to a patent without further payment. At the end of three years of such residence he might receive a patent, without further payment, upon proof that he has had under cultivation for two years 1 acre of timber for each 16 acres. (Act of 1873, March 3, chapter 277, 17 Stat. L., 605, now Rev. Stat., § 2317.)

In 1873 Congress entered upon an additional policy. By the act of March 3, chapter 277, entitled "An act to encourage the growth of timber on the Western prairies," Congress provided, as reproduced in the Revised Statutes, that—

SEC. 2464. Every person who plants, protects, and keeps in a healthy growing condition for ten years forty acres of timber, the trees thereon not being more than twelve feet apart each way, on any quarter section of any of the public lands, shall be entitled to a patent for the whole of such quarter section at the expiration of the ten years, on making proof of such fact by not less than two credible witnesses: Provided, that only one quarter section in any section shall be thus granted.

SEC. 2465. Every person applying for the benefit of the preceding section shall, upon application to the register of the land office in which he is about to make such entry, make affidavit before the register or receiver that such entry is made for the cultivation of timber, and upon filing his affidavit with the register and receiver, and on payment of ten dollars, he shall thereupon be permitted to enter the quantity of land specified.

SEC. 2466. No certificate shall be given or patent issue therefor until the expiration of at least ten years from the date of such entry; and if, at the expiration of such time or at any time within three years thereafter, the person making such entry or, if he be dead, his heirs or legal representatives, shall prove by two credible witnesses that he has planted and for not less than ten years has cultivated and protected such quantity and character of timber, he shall receive the patent for such quarter section of land.

It will be observed that this act allowed the benefit of the provisions to "every person" without requiring citizenship or residence, and that upon payment of $10 at the time of entry he becomes entitled to a patent at the end of ten years upon proof that he has planted, cultivated, and protected timber according to the provisions of the act, without further payment.

With all these provisions the Government found itself in possession of much desert land which had not been sold for cash or taken up under the preemption or homestead laws.

11 As to such lands in certain States and Territories named, Congress entered upon still another policy, by offering the same to citizens upon quite different terms, as set out in this act of 1877, March 3, chapter 107, now under consideration (1 Supp. to Rev. Stat., 2d ed., p. 137), upon which the present action is founded.

This act provides that any citizen, or person who has duly filed his intention to become such, without any requirement as to family or age, upon payment of 25 cents per acre, may file a declaration, under oath, with the register and receiver of the district where the land is situated, that he intends to reclaim a tract of desert land, not exceeding one section, by conducting water upon the same within a period of three years thereafter, and that at any time within three years thereafter, upon satisfactory proof of the reclamation of the land as therein provided, upon payment of the sum of one dollar per acre, a patent for the same shall be issued.

There is no proviso like that in section 2357 of the Revised Statutes, and no reference to "minimum price," as in the preemption statutes, nor to the "double minimum price," as in the land-grant statutes, and other conditions or act required besides the payment of money. The amount

to be paid is expressly fixed by the act itself and the whole consideration is entirely independent of the provisions of any other public land laws. Purchasers are not required to look back a half century to the statutes of 1820, enacted upon a different policy of the Government, for any of the terms on which sales may be made. The act of 1877 itself contains specifically all the terms of the offer of the Government.

Such was the construction given by the Interior Department immediately upon the passage of the act, as appears by the circular of March 12, 1877, set out in Finding I, last clause there printed in italics. The decision was cotemporaneous, having been made only nine days after the passage of the act, when the public officers charged with its execution better understood its objects than those who years afterwards come to administer it, and was followed by the Department for more than ten years thereafter. It is, therefore, entitled to the benefit of the ruling of the Supreme Court in the case of Edwards' Lessees v. Darby (12 Wheaton, 210), which has been repeatedly cited with approval by that court and many other courts, and has become a familiar principle of law. (U. S. v. Union Pacific R. R., 37 Fed. R., 555; Rand v. U. S., 38 Fed. R., 667.) The Court there said:

"In the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law and were appointed to carry its provisions into effect is entitled to very great respect."

It was not till more than ten years later, June 27, 1887, that another Secretary issued a circular, set out in Finding II, addressed to the registers and receivers, raising the price to just double that expressed in the act of 1877, as set out in the third paragraph, therein printed in italics.

In January, 1892, the then Secretary of the Interior, in answer to a letter of the Commissioner of the General Land Office asking instructions on the subject, made a ruling, set out in Finding III, reversing the decision of his predecessor in 1887 and returning to that of 1877 and the former practice.

In September, 1893, still another Secretary, on an application for refund of the excess overpaid, emphatically adhered to the later decision, as appears by said Finding III. (Decisions of the Department of the Interior relating to public lands, vol. 14, pp. 75, 76; vol. 17, p. 339.)

In these latest two decisions reference is made to the act of 1891.
12 March 3, chapter 561 (1 Supplement to Rev. Stat., 2d ed., p. 940),
But that act made no change in the requirements of the previous statute as to the amounts to be paid the Government. It adds six new sections extending the provisions to Colorado and making some alterations not relating to the money to be paid.

The practice of the Department is now what it was the first ten years after the passage of the act.

There is no question of repeal involved in the case. It is not claimed by anybody that the proviso of the act of 1820, found in R. S., § 2357, has been repealed; the only question is as to its application to a later act. It seems to us clear that the proviso applies to the disposal of public lands at auction or private sale for cash, according to the existing public policy at that time, and not to any additions made thereto, and has no application to the disposition of lands under the desert-land act passed many years thereafter upon a different policy and for a different purpose. We hold

with the Secretaries of the Interior of 1877, 1892, and 1893 that a purchaser was bound to pay no more than was required by the act of 1877. All in excess of that amount exacted of him was an overpayment.

It remains to be considered whether or not such overpayment was so far voluntary and in mistake of law on his part that he can not recover it back in an action at law.

As was said, substantially, in a former case cited and adopted in Elsworth's Case (14 C. Cls. R., 382, 394), that the general rule of the common law is that money paid in mistake of law, when all the facts are known to the parties, and there is no fraud, can not be recovered back. This rule is founded on the maxim of the civil law, "ignorantio legis neminem excusat," which in its application to the administration of the law of crimes and offenses is a concise and correct enunciation of a sound principle of public policy. But when made the foundation of a rule, that money paid in mistake of law can in no case be recovered back unless fraud is proved, its application seems to be extended far beyond justification.

When one has committed a crime or offense, and has thereby done injury to persons and a wrong to the State, he may well be confronted with the maxim that "ignorance of the law excuses no one," and with justice may be compelled to submit to the penalty which the law imposes upon him for his wrongful act. But when one pays, in mistake of law, money which he does not owe, and which the receiver has no right in justice and conscience to retain, he does not commit a wrong, and is not estopped from recovering back what he paid; it is the receiver who does a wrong, and attempts to excuse it on the ground of mistake on the part of the person whose money he unjustly received and retains.

The rule has often been presented to courts in cases in which its application would work manifest hardship, injustice, and wrong; to obviate which it has been denied or explained away, and sometimes a nice distinction drawn between ignorance and mistake of law, by which the rule was held to be restricted to cases of ignorance, and not to apply to cases of mistake. This distinction, although supported by strong reasons, is too subtle to be of much practical importance. The Supreme Court, in recognizing the rule, at the same time recognizes the fact that it has exceptions
13 and limitations. (Hunt v. Rousmanier's administrators, 1 Peters, 15; Bank of the United States v. Daniel, 12 Peters, 48.)

It has been held that money may be recovered back in an action for money had and received in mistake of law where there is a full knowledge of all the facts, if the mistake is clearly proved, and the defendant can not under all the circumstances in good conscience retain it; and, as obviating the necessity of exceptions and subtle distinctions, this would seem to be a better rule, and it is supported by many authorities. (See, among other cases, Northup v. Graves, 19 Conn., 554; Culbreath v. Culbreath, 7 Geo., 64; Stedwell v. Anderson, 21 Conn., 139; Underwood v. Brochman, 4 Dana, 309; Hopkins v. Mazyck, 1 Hill, Ch. R., 242; Lawrence v. Beaubien, 2 Bailey, 623; Lowndes v. Chisolm, 2 McCord, Ch. R., 455; Robinson v. City Council, 2 Richardson, 317, 320; Farmer v. Arundel, 2 Wm. Black, 825; Moses v. Macfarlan, 2 Burr, 1002.)

But perhaps the most correct rule would be that where the law is unsettled and in doubt money so paid in mistake of the true construction may be considered in the nature of a compromise and so not to be recovered

back unless it be paid between persons who do not stand on an equal footing. (Morgan v. Palmer, 2 Barn & C., 720; Steele v. Williams, 8 Wells; Hurl & Gard, 625, 1 Smith's Leading Cases, part 2, 440 and 428; Kinney v. Dodge, 101 Ind., 573; United States v. Lawson, 101 U. S. R., 164; Swift Co. v. United States, 111 U. S. R., 22; Elsworth's Case, 14 C. Cls. R., 384, affirmed by the Supreme Court, 101 U. S., 170.)

There can be no doubt that the parties in this case did not stand on equal footing. The claimant was a private citizen without power in the matter. The receiver was a public officer bound to follow the instructions of his superior. The claimant desired to obtain a patent for certain desert land. He had a right to do so on terms offered by the desert land act of 1877. When he went to the office of the register he found that he could not have the land on the terms offered, but was required to pay double the amount therein specified. What was he to do? He might have protested to the receiver, but was not obliged to do so. No statute required a protest for the foundation of an action, as in the payment of customs duties. (R. S., secs. 3011, 3012.)

The object of a protest not required by statute is to give the receiver of the money an opportunity to recede from his demand. But the receiver in this case was a subordinate public officer, acting under general instructions from his superior, over which he had no control. To have protested then and there would have been an idle proceeding, and the law does not require proceedings which are merely useless. Should he have protested to the Secretary of the Interior? He knew that the Secretary had by law supervision of Government business in relation to the public lands, and had his office in Washington, thousands of miles away. He knew that the Secretary had made his decision of general application, and many efforts for obtaining a reversal of it or an exception in his favor would require time, labor, and expense, with little prospect of success, at least during the term of office of the same Secretary. In the meantime what he had expended in preparing for irrigation might be lost, and some other enterprising citizen might enter the same land by paying the sums exacted, and his opportunity would be lost. The particular lot of land and time of obtaining it might be material to him. He was justi-
14 fied in paying the price and in postponing his remedy therefor to some future day when he could better attend to it. The ruling of the Secretary of the Interior was in the nature of compulsion which the claimant was powerless to resist without sacrificing his rights under the law. We do not think it was his duty to exhaust all means within his power (if any there were) to obtain his rights, but was justified in paying the price exacted by the receiver as upon compulsion, and to abide his time for bringing an action to recover back the excess.

The defendants, having received money of the claimant upon the erroneous construction of a statute by a public officer, can not in good conscience retain it.

That the Government could not have recovered if the mistake had been the other way and the claimant had paid less than the statute price is not a sound argument. The Government is frequently estopped by the errors of its officers in paying out money on misconstruction of statutes, under high executive authority, by which innocent parties have been misled (Hartson's Case, 21 Ct. Cls., 451), but it does not therefore follow upon

any principle of law or justice that parties who have paid too much by the actions of officers are estopped, within the period of limitation, from maintaining suits for overpayments.

Had there been any discretion in the Secretary or receiver to fix any price other than that named in the act, then the parties would have stood on equal footing. There was no such discretion, and the decision by the Secretary was an official act within the scope of his authority, and was final for executive purposes. The claimant had no part in making it, and was not bound by it, but could not then resist.

Congress, the law-making power, alone had the right to establish the price of the land, and having established it, no public officer had authority to make a change. The Secretary of the Interior is not the Government; being charged with the duty of executing the law he had the power, but not the right, to double the price fixed by law and to exact from the claimant the excess which he paid:

The conclusion of the court is that the claimant recover the sum of $799.

15 V. *Dissenting opinion.*

NOTT, J., dissenting:

The rule is not a technicality, but a principle, that where a matter is closed voluntarily without fraud or mistake it must stay closed. Courts are not established to unsettle the transactions of men.

That a completed business transaction with the Government can be torn up for no better reason than that the judiciary differ from the executive in the construction which should be given to a statute, seems to me a proposition which should be dropped as soon as stated.

When the Government steps into the common arena of buying or selling property it lays aside its prerogatives of sovereignty and is ruled in its transactions by the rules which regulate the affairs of men; and when the individual deals with the Government in matters of contract he is entitled to no different rule of law than when he deals with one of his fellow-men. In these cases of land sales the Government can not sue one set of purchasers for double the agreed price, on the ground that its agent, the Commissioner of the Land Office, exceeded his lawful authority by a misconstruction of the statutes and sold the land too cheap; and if the Government can not reopen the transaction because of the erroneous act of its agent, the claimants can not.

It was said on the argument that the purchase was not voluntary, because the contracting parties did not stand on an equal footing. Let us test that. Could the claimant compel the Commissioner of the Land Office to sell the land? No. Could the Commissioner compel the claimant to buy it? No. Then they did stand on an equal footing.

It may be thought that this case is like Mosby's (133 U. S. R., 273), but there is not the slightest similarity between the two. Mosby's case was founded on a law of Congress; the claimant was a public officer; his services were rendered before he was ordered to pay over the money; he did not pay it over voluntarily, but pursuant to the order of his superior. The present is a case of contract. The only case like it is that of the

laborer in the New Testament, who, after doing his work and receiving his wages, came back for more on the ground that somebody else had done less work in the vineyard than he.

About the middle of the century the Government entered upon its land-grant railroad policy. One justification given by Congress to the country was that by giving away one-half of the land in a railroad belt the other half thereby would be doubled in value. Accordingly the price for such lands was doubled, and they were supposed to be a special estate carved out of the public domain. In 1874 the Revised Statutes expressed the idea by a proviso to section 2357, saying "That the price to be paid for alternate reserved lands along the line of railroads within the limits granted by any act of Congress shall be $2.50 per acre." Whether the interpretation by which the claimant seeks to escape from this requirement of the law is artificial or rational I do not stop to inquire. It is sufficient to show that this case rests upon a mere question of statutory construction, and that the claimant seeks, by a technical use or abuse of statutory terms, to pay no more for 640 acres of land, for the improvement of which the Government sacrificed 640 acres of adjoining land, than another man must pay for similar land 500 miles distant from a railroad; and this after having entered into an agreement and paid the price and received the deed and obtained possession of the land.

The claimant had no personal right to the acquisition of this property. If the Commissioner of the Land Office had fixed the price at $1.50, a dozen other men might have been before him; if he had not taken it at $2.50, a dozen other men might have been ready to take it who would not have repudiated their agreement. The case, in my judgment, is devoid of law, equity, and morals.

16 VI. *Judgment of the court.*

At a Court of Claims held in the city of Washington on the 19th day of February, A. D. 1894, judgment was entered as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said Benjamin Healey do have and recover of and from the United States the sum of seven hundred and ninety-nine dollars.

BY THE COURT.

17 VII. *Application of defendants for, and allowance of, appeal.*

BENJAMIN HEALEY
vs.
THE UNITED STATES. } No. 18122.

From the judgment rendered in the above-entitled cause on the 19th day of February, 1894, in favor of claimant, the defendants, by their Attorney-General, on the 19th day of March, 1894, make application for, and give notice of, an appeal to the Supreme Court of the United States.

J. E. DODGE,
Assistant Attorney-General.

Filed March 19, 1894.
Allowed in open court May 17, 1894.

WILLIAM A. RICHARDSON,
Chief Justice.

18 In the Court of Claims.

BENJAMIN HEALEY
vs.
THE UNITED STATES. } No. 18122.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court and the dissenting opinion, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 19th day of May, A. D. 1894.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Case No. 15592. Court of Claims. Term No. 708. The United States, appellant, *vs.* Benjamin Healey. Filed May 21st, 1894.

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Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

UNITED STATES, APPELLANT,
v.
BENJAMIN HEALEY, APPELLEE.

No. ~~708.~~ 378

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

UNITED STATES, APPELLANT,
v.
BENJAMIN HEALEY, APPELLEE. } No. 708.

MOTION TO ADVANCE.

This appeal presents the question whether the price to be charged for what are known as "desert lands," now comprising a very considerable part of the public lands being disposed of, is $1.25 per acre or $2.50 per acre, where the same are situated within the limits of a railroad land grant. It is a question of great importance, since such lands are continually being purchased, and different rulings have been made by the Interior Department, at one time the price of $2.50 being charged and at another $1.25.

There have already been commenced about one hundred cases upon sales made at the $2.50 rate, and the Department is given to understand that a large number, approximating one thousand, of similar claims are only awaiting

an authoritative decision of the question. Besides this, is the question whether liability may not result to railroad companies or to those purchasing land from railroad companies within the limits of a land grant, if the Government sells its own lands within the same grant for less than $2.50 per acre, that price being fixed by the land grant statute.

This case has been expedited as a test case in the Court of Claims and went to judgment shortly before the close of the last term of this court. The questions are of a character to make it seem essential that they should be presented orally and not upon submission under the twentieth rule.

For these reasons the Solicitor-General respectfully moves the court to advance the case and set it for hearing during the present term. The appellee consents to the granting of the motion.

LAWRENCE MAXWELL, JR.
Solicitor-General.

Office Supreme Court U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, APPELLANTS,
v.
BENJAMIN HEALEY.
No. ~~708.~~ 378

BRIEF AND ARGUMENT ON BEHALF OF APPELLANTS.

OF THE PRICE OF PUBLIC LANDS WITHIN THE LIMITS OF A RAILROAD GRANT, AND OF THE RIGHT OF RECOVERY OF ALLEGED OVERCHARGE FOR LANDS ENTERED UNDER THE DESERT-LAND ACT.

SUBJECTS:

Statutory Construction.
Repeal by Implication.
Voluntary Payments.

GEORGE H. GORMAN,
Assistant Attorney.
J. E. DODGE,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, APPELLANTS,
v.
BENJAMIN HEALEY.
No. ~~708~~. 378

BRIEF AND ARGUMENT ON BEHALF OF THE APPELLANTS.

STATEMENT.

This is an appeal from a judgment of the Court of Claims rendered against the appellants and in favor of the appellee, upon the following state of facts:

On February 5, 1889, the appellee filed at the local land office a declaration of his intention to reclaim a tract of land (under the provisions of the act of March 3, 1877, Sup. Rev. Stats., 137), situated within the limits of a grant theretofore made by the United States to the Southern Pacific Railway (14 Stats., 299), paying to the local land officers, without any objection, protest, or effort to avoid such payment, the sum of $319.60, which was 50 cents per acre for said land. September 21, 1891, the appellee

(having complied with the provisions of the law as to conducting water on the land, etc.) made final proof on his entry and paid to the local land officers, without objection, protest, or effort to avoid such payment, the sum of $1,278.40, which made a total of $2.50 per acre for the land so taken up. September, 1893, the appellee brought his action in the Court of Claims, in which he sought to recover from the United States one-half of the money paid for the land as aforesaid, upon the theory that, under the provisions of the desert-land act of March 3, 1877, the said appellee, in purchasing said land was required by law to pay only $1.25 per acre, and that, having been charged $2.50 therefor, he was entitled to recover back one-half of the amount paid, as having been received from him by the officers of the Government without authority of law.

The case having been heard in the Court of Claims, that court rendered judgment in favor of the appellee and against the appellants, from which said judgment the appellants appeal to this court.

The case was prepared and argued in the court below as a test case, upon the decision of which is to be determined about 1,000 similar claims now pending or threatened in the Court of Claims.

ASSIGNMENTS OF ERROR.

I.

The Court of Claims erred in its conclusion of law that claimant is entitled to recover the sum of $799 and in rendering judgment therefor.

II.

The court erred in holding that the price fixed by law for the lands purchased by the claimant was only $1.25 per acre.

III.

The court erred in refusing to hold that the purchase money paid by claimant was paid voluntarily and without duress, fraud, protest, or mistake of fact, and therefore could not be recovered.

ARGUMENT.

I.

THE SUM PAID BY THE APPELLEE WAS THE LAWFUL PRICE OF THE LAND PURCHASED.

The existing laws recognize several classes of lands, as follows:

Mineral.—"In all cases 'lands valuable for minerals' shall be reserved from sale, except as otherwise expressly directed by law." (Section 2318, R. S.)

Timber and stone.—Lands valuable chiefly for timber and stone, unfit for cultivation.

Saline.—Salt springs.

Town-site lands.—Any unoccupied public lands.

Coal lands.—Lands containing coal.

And all others as *agricultural.*

Special laws are provided for each of the six classes named. Lands reserved or withdrawn "are not subject to entry or location."

lic domain to the States and to corporations as an inducement to and in aid of the construction of railway lines within the United States. This policy has been followed from time to time up to the present day, and under it large amounts of public land have been thus parted with, as will be seen by a table appended to this brief, showing States and corporations to which grants have been made in aid of the construction of railroads.

In nearly every instance where lands were thus granted to aid in the construction of railroads it was provided in the law making the grant that the alternate sections along the line of the railroad, which were reserved to the Government, should not be disposed of by the United States for a less price than $2.50 per acre. For example: In the grant to the Northern Pacific Railroad (13 Stats., 369) it is provided:

> And the reserved alternate sections shall not be sold by the Government at a price less than $2.50 per acre.

In the grant to the California and Oregon Railroad Company it is provided (14 Stats., 240):

> And the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands.

In the grant to the Oregon Central Railroad Company (16 Stats., 94) it is provided:

> And thereafter the remaining public lands subject to sale within the limits of the said grant shall be *disposed of only to actual settlers* at double the minimum price for such lands.

See also 10 Stats., ch. 45, sec. 3, p. 9; ch. 72, sec. 2, p. 302; 11 Stats., ch. 28, sec. 2, p. 9; ch. 31, sec. 2, p. 16; ch. 41, sec. 2, p. 17, and other acts of similar import.

It will be observed that the provisos in these acts do not refer merely to a public or private, absolute or unconditional, sale of these lands, but to any sort of disposition of them on the part of the Government for a less price than $2.50 per acre. The idea was that the Government would be compensated for the land given away by the remaining land becoming twice as valuable as before and that the land granted should be guaranteed a value without competition below $2.50 per acre. And such was the reason assigned for making the railroad grants.

Such was and continues to be the status and policy of the law with reference to the price of public lands of an agricultural nature. So the revisers found it when they came to revise the statutes of the United States. They found that, by positive enactment (act April 24, 1820), lands of an agricultural nature were priced at $1.25 per acre when sold. They also found (see the various statutes heretofore cited) that it had been the uniform custom and policy of Congress, when making grants of public lands to States or to corporations in aid of the construction of railroads, to raise the price of the alternate sections along the line of the grant, which were reserved to the Government, to $2.50 per acre—prohibiting the sale or other disposal of such lands for a less price. Accordingly, the revisers set about to reduce the true intent and

policy of Congress on this subject to a general law, which they did in the following words (Rev. Stats., sec. 2357):

> SEC. 2357. The prices at which the public lands *are offered for sale* shall be $1.25 an acre; and at every public sale, the highest bidder, who makes payment as provided in the preceding section, shall be the purchaser; but no land shall be *sold, either at public or private sale* for a less price than $1.25 per acre; and all public lands which are hereafter offered at public *sale*, according to law, and remain *unsold* at the close of such *public sales*, shall be subject to be sold at private *sale* by entry at the land office, at $1.25 an acre to be paid at the time of making such entry: *Provided*, That *the price to be paid* for alternate reserved lands along the line of railroads within the limits granted by any act of Congress, shall be $2.50 per acre.

This section was adopted and passed by Congress in 1874, and thus at that time became the law of the land, and, unless it has been repealed, altered, or amended by some subsequent act of Congress, it still remains the law of the land. The learned Chief Justice, therefore, seems to us in error when he says in the opinion delivered in the court below that this case does not involve the question of the repeal or alteration of a prior by a subsequent act.

Before passing to an examination of this question, however, which was passed over by the court below by saying that section 2357 of the Revised Statutes was "not applicable" to an acquisition of land under the desert-land act, we desire to present some considerations to the court, which show very conclusively that it is applicable to such an acquisition of lands.

In the court below it was contended, and the court appears to have adopted the reasoning of counsel, in substance, that there is a distinction between a *sale* of land and an acquisition of land under the provisions of the desert-land act; and that while section 2357 of the Revised Statutes prohibits the *sale* of land within the limits of a railroad grant for less than $2.50 per acre, it does not prohibit the Government from disposing of such land in any other way (for example, under the terms of the desert land act) for a less price than that named.

In answer to such a contention, we submit that it is a misquotation and a distortion of the language and the intent of the proviso of section 2357; and, even if the proviso referred to *sales* only (which it does not), the distinction is fanciful and has no foundation in law. Of these in their order.

The first thing that presents itself to one's attention in reading section 2357 of the Revised Statutes is the difference between the language employed in the body of the section and that employed in the proviso, which we have indicated by the use of *italics*. In the body of the section it is provided that "the price at which lands are *offered for sale* are $1.25 per acre; and at every *public sale* * * * but no land shall be *sold either at public or private sale* at a less price"—and so on, always using the word "sale" preceded or followed by the words "public or private." But in the proviso the language is "provided that the *price to be paid*" for the alternate reserved sections along the line of a railway grant shall be $2.50 per acre. This difference of phraseology is not accidental.

It has a meaning; and, in the light of the history of land legislation heretofore given, it is not at all difficult to see what that meaning is.

If section 2357 was the expression of a single purpose, or of two or more *concurrent* purposes, the expression of a main legislative idea and its qualifying proviso, brought into existence at the *same time* and under *like circumstances*, the difference in phraseology employed in the body and in the proviso of the section might be immaterial, and there might be some ground for holding that the words "the price to be paid," occurring in the proviso, referred to "public or private sale," as used in the body of the section. But such is not the case. The body of this section is taken from the third section of the act of March 3, 1820, and refers to sales for cash, either at public auction or in private, because at that time there was *no other way* provided by law for the disposal of the public lands.

The proviso, however, is, virtually, *an act of* 1874, half a century removed from the act which forms the body of the section. This proviso is an embodiment of the general policy and intention of Congress, as indicated by the many acts that it had passed from time to time, that lands which lie within the limits of any railroad grant should not be *disposed* of for less than $2.50 per acre—not, necessarily, "sold," or "sold at public auction or private sale," but disposed of in anywise—the object being to reimburse the Government for the lands given away by doubling the value of those remaining, and at the same time to make the land granted to the railroad (as an inducement to its construction) of some value to it—of the value of at least $2.50 per acre, by not permitting land along its line to

be disposed of for a less sum—an inducement upon which the corporation doubtless relied in building the road. Hence there is, very properly, a difference in the language of the two portions of the statute, because there is a difference in purpose between them.

Lands beyond the limits of a railroad grant—beyond 40 miles of a railroad—being of little value for agricultural purposes, it does not much matter for what price they are disposed of to actual settlers. But land along the line of a railroad is valuable, and will be sought by the investor and home-seeker. It is important, therefore, that the Government should at all times and under all circumstances receive a fair price for such lands; and it is also important to keep faith with the railroad company by not *underselling* it in the markets after having expressly promised that such lands should not be disposed of by the Government for less than $2.50 per acre. And so, when the proviso to section 2357 says that "*the price to be paid* for alternate reserved lands along the line of railroads, within the limits granted by any act of Congress, shall be $2.50 per acre," the statute *means* just precisely what it *says*: that $2.50 per acre is "the price to be paid" for such lands *in whatever manner* they may be acquired from the Government.

When it becomes necessary to construe language which leaves a doubt of its meaning, the original statute may be resorted to for the purpose of ascertaining that meaning.

United States v. *Bowen*, 100 U. S., 508.
Victor v. *Arthur*, 104 U. S., 498.
Meyer v. *Car Co.*, 102 U. S., 1.
United States v. *Lacher*, 134 U. S., 624.

Where two statutes *in pari materia*, originally enacted at different periods of time, are subsequently incorporated in a revision and reenacted with the design to accomplish the purpose they were originally intended to produce, the times when they first took effect will be ascertained by the courts and effect will be given to that which was the latest declaration of the legislative will.

Winn v. *Jones*, 6 Leigh. (Va.), 74.
Blackford v. *Hurst*, 26 Gratt (Va.), 207.
Hurley v. *Texas*, 20 Wisc., 638.
United States v. *Bowen*, 100 U. S., 508.
Victor v. *Arthur*, 104 U. S., 498.
Mobile Savings Bank v. *Patty*, 16 Fed. Rep., 751.

The Court of Claims has reversed this rule. They have gone back to the old act of March 3, 1820, from which they borrow language and incorporate such borrowed words into later acts, in order to limit and qualify them. If there be any conflict between the meaning of the body of section 2357 and its proviso, the proviso, being the latest expression of the legislative will, should be made to govern the section; and we submit that it is contrary to every rule of statutory construction to incorporate the words "sale" or "public and private sale" into the proviso of the section when the revisors did not put them there, and thus to qualify and limit the legislative will as expressed in statutes from 1850 to 1874, by the legislative will as expressed in 1820; and that, too, in face of the fact that the legislative branch of the Government had mentioned in the act of 1820 *every method known to the law at that time* for the disposal of public lands, and

the word sale therefore was not used to distinguish one mode of disposal from another.

The proviso to section 2357 was framed in consonance with that intention and in accord with the manifest policy of the Government in relation to Government lands within the limits of a railroad grant; and the reason the revisers used the sweeping words "the price to be paid," instead of following the more limited phraseology used in the act of 1820, was that since that time methods had been devised for the disposal of the public lands (for example—the timber culture, the homestead, and the preemption laws) that, it might be contended, were not "sales" of land within the meaning of the act of 1820; and so, to remove all doubt on this point, the revisers used the words "the price to be paid," so that all the world might know that the "price to be paid" for lands within the limits of any railroad grant is $2.50 per acre, irrespective of the manner in which they are acquired. Thus the very object of the revisers, in using the words which they employed in the proviso, was to prevent anyone from supposing that the proviso only referred to an acquisition of lands by public or private sale, as did the act of 1820—an object that has been utterly defeated by the construction placed upon it by a majority of the Court of Claims.

Not only is it permissible to refer to the original acts when endeavoring to ascertain the intent or meaning of the words employed in a revision, but the title of the original act may be likewise consulted for that purpose.

Mayer v. *Car Co.*, 102 U. S., 1.

The learned chief justice, delivering the opinion of a majority of the court below, says (Rec., p. 12, top):

> Purchasers are not required to look back half a century to the statutes of 1820, enacted upon a different policy of the Government, for any of the terms on which sales may be made.

No, we do not contend that purchasers are so required, but we do submit that purchasers of public land are bound to know the law, like all other men, and can not take advantage of their ignorance of it (although the majority of the Court of Claims seem to be of the opinion that they *can*, except in criminal cases. Rec., p. 13). We do not ask them to go back to the act of 1820, for that act has nothing to do with this case, but we do ask that they "go back" to the proviso of section 2357, Revised Statutes (which is virtually the act of 1874), and there find out that lands which lie within the limits of a railroad grant can not be obtained from the Government for a less price than $2.50. The court below has "gone back a half century to the act of 1820," for words to limit and defeat the plain and simple language of the proviso of section 2357 of the Revised Statutes.

Thus, even admitting that there is a distinction between a "sale" of the public lands and their acquisition under the terms of the desert-land act, for example, we submit that the proviso of section 2357 is not confined to an acquisition of land by purchase and sale, but is equally applicable to an acquisition of public land in other way prescribed by law.

But we utterly deny that there is any such distinction. We submit that the term "sale," as used in section 2357

of the Revised Statutes, is a generic term, and has reference to *all* methods of disposing of the public lands; and the price at which public lands may be disposed of is the price fixed by said section, unless otherwise specially provided.

The only way in which property can be rightfully acquired is by original acquisition, by discovery, or conquest; by barter; by gift; by exchange, or by purchase. No other means is known to the law. The petitioner's acquisition of the land in question, therefore, must have been by purchase and sale.

Various definitions have been given of the word "sale." A large collection of such definitions may be found on page 446 of the twenty-first volume of the American and English Encyclopedia of Law, and on page 914 of Anderson's Law Dictionary. In the majority of cases the word is used in connection with personal property. The view which seems to reconcile all uses of the word most satisfactorily is to regard a sale as a contract or agreement for transferring ownership, and not as the very transfer itself. It may then be applied to lands and rights in action, as it daily is, as well as to chattels. This view also supports the convenient expressions, "conditional," "executed," and "unexecuted" sales.

2 Abb. Law Dict., 442.
Anderson's Law Dict., 914, and cases cited in note 5.

A sale, then, whether of real or personal property, may be either absolute, conditional, executed, or executory. The kind of sale provided for by section 2357, Revised Statutes, is an absolute sale—that is, a sale outright and

where nothing remains to be done on the part of either buyer or seller, and to which there are no conditions attached. The kind of sale which is provided for in the desert-land act, on the contrary, is what is known as a conditional sale, or sale upon conditions; and, *mutatis mutandis*, is exactly similar to that class of cases in which the buyer is to do a thing as a condition on which the passing of the property or title depends. In such cases the property or title does not pass at all until the condition is fulfilled, even though possession be delivered to the purchaser.

Elgee Cotton Cases, 22 Wall., 187–196.
Heryford v. *Davis*, 102 U. S., 246.
Pope v. *Allis*, 115 *Id.*, 363–371–372.
Anderson's Law Dict., 915.

So in the case at bar. The statute offers for sale certain public lands to certain persons upon certain terms and conditions, to wit:

(1) Whomsoever desires to become a purchaser of the lands under this offer of sale is required to make an initial payment of 25 cents per acre and to file with the register and receiver his declaration of intention to reclaim said land by conducting water thereon, etc. Upon the performance of this condition the entryman or prospective purchaser is permitted to go upon and occupy the land. He thereby acquires an inceptive right to and a qualified interest in the land. Until the requirements mentioned below are performed, and until patent is issued by the Government, the fee remains in the Government (*Bagnell* v. *Broderick*, 13 Peters, 436); but upon the fulfillment of the conditions mentioned in this paragraph he becomes

vested with an *equitable* right to demand the patent after he shall have performed the conditions set forth in the paragraph below—that is, after such further proceedings as the law and the course of business in the Department require.

Langdon v. *Sherwood*, 124 U. S., 83.
Fenn v. *Holm*, 21 How., 488.
Hooper v. *Schiemer*, 23 *Id.*, 249.
Foster v. *Mora*, 98 U. S., 425.

(2) The second condition of the sale is that (within three years from the filing of the declaration mentioned above) the entryman or prospective purchaser shall make satisfactory proof (to the register and receiver of the local land office) that he has conducted water upon the land, etc., and shall pay to the receiver the additional sum of $1 per acre (provided the land be single minimum—see page 1). Thereupon the sale becomes absolute and completed, and the Government issues a patent (the Government's deed) to the purchaser of the land.

How, then, can it be contended that such an acquisition of land is not by purchase and sale? It is a *conditional* sale, it is true, but it is none the less a sale—just the same sort of sale upon condition precedent as is made in the mercantile world every day. So there are several different methods prescribed by the statutes for the *sale* of the public lands. One is by absolute sale for cash at public auction; another is an absolute sale for cash in private; another is a conditional sale embraced within the terms of an offer of sale known as the desert-land act, etc. While it is true that the term "desert entry" includes a "sale,"

it is none the less true that the term "sale" includes a "desert entry." In other words, the term "sale" is a generic term and comprehends all the various varieties of sales that have been created by the acts of Congress; and if section 2357 of the Revised Statutes had declared that no land which lies within the limits of a railroad grant shall be *sold* for a less price than $2.50 per acre, the meaning would be that they shall not be *sold*—neither sold absolutely, conditionally, or in any other way, for a less sum than the specified price.

In the case of *Railroad Co.* v. *Dunmeyer* (113 U. S., 629), the court held that the act of July 13, 1866 (being an amendment and extension of the time mentioned in the original grant), which authorized the Secretary of the Interior to withdraw certain lands from *sale* on filing a map of the *general route* of the road with him, did not reserve such lands from entry under the *preemption* and *homestead* laws.

On page 638 of this case Mr. Justice Miller uses certain general expressions which counsel quoted in their brief in the court below and upon which they appear to found all their hopes of success in the contention that an entry under the desert-land act of 1877 is not a *sale* of lands within the meaning of section 2357 of the Revised Statutes.

It is believed, however, that a careful examination of the case will disclose the fact that it is not authority for the contention of the petitioner.

In making this examination let us keep constantly in mind the well-known rule of construction, that in cases of *public* grants the words thereof are to be construed most

strongly *against* the *grantee* and *strictly* in *favor* of the Government, on the grounds of public policy. If the meaning of the words be doubtful in a grant designed to be of general benefit to the public, they will be taken most strongly *against* the grantee and *for* the Government; and therefore should not be extended by implication in favor of the former beyond the obvious meaning of the words employed. Any ambiguity in the terms must operate in favor of the Government. Whatever is not unequivocally granted is withheld. Nothing passes by such grant save that which is given in clear, explicit, and unambiguous terms. (See Southerland on Stat. Con., sec. 378.)

In section 379 of his work Mr. Southerland continues:

> These principles have been steadily recognized in the construction of land grants made by the Federal Government in aid of railroads and other purposes. These grants are laws as well as contracts, and are to be construed to effectuate the legislative intent, and this must sometimes be deduced from complex provisions. To ascertain such intent, the court may look to the *condition of the country* when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together.

And in support of the doctrines laid down above, the author cites, among others, this very case of *Railroad* v. *Dunmeyer;* and it it is believed that the above principles governed the decision in that case, although the opinion does not so state in terms.

The facts in the Dunmeyer case were as follows: By the act of 1862, upon the filing of the company's map of designation of its general route, the Secretary of the Inte-

rior was required to withdraw the lands within 15 miles of said designated route "from *preemption, private entry, and sale.*" For four years the company neglected to select their route and file their map. In 1866 an act was passed allowing them six months and no more within which to do so. This act of 1866 did not give the Secretary the same directions that were given to him by the act of 1862. The act declared that the lands along the entire line should be reserved from *sale* by order of the Secretary. The words "preemption" and "private entry" are omitted. The question then arose whether the lands along the line of the road were subject to preemption and private entry. The court, in passing on the question, reasoned, in substance, thus: Here is a public grant; its provisions are to be taken strictly against the railroad and strictly in favor of the Government. Nothing is given save that which is granted clearly, expressly, and unequivocally. In the act of 1862 Congress saw fit to designate the *kind* of sales from which the land along this railroad should be withdrawn; to wit, absolute sales, either public or private, and conditional sales under the preemption laws. Four years afterwards Congress, instead of forfeiting the grant to the railroad, saw fit to extend the time for filing, etc., six months. In doing so, however, they changed the conditions of the grant, and instructed the Secretary of the Interior to withdraw the lands from *sale* only. Why was this done? Obviously for some reason deemed sufficient by Congress. These lands, then, are reserved from "sale" only. But what sort of sale? Look at the act. They have excluded "private entry" and "preemption" sales in the latter act, while being careful to enumerate them in

the former. The only other kind of sale that is known to the law is the absolute public sale for cash. It is this kind of sale, then, from which the lands are withdrawn, and the court so held.

If the desert-land law or the timber-culture act had been in existence at that time and the court had been called on to construe the original grant of 1862, can it be doubted that the court would have pursued the same line of reasoning and have excluded such sales from the operation of this grant?

The same principle which limited the use of the word sale in the Dunmeyer case would broaden the words used in the proviso of § 2357. The right of the claimant against the Government is here predicated on restrictive construction, there on a liberal one.

The line of reasoning pursued by counsel carries with it its own refutation, and resolves itself into a *reductio ad absurdum*. If the position taken by counsel with regard to the meaning of the desert-land act of 1877 and its effect on section 2357 of the Revised Statutes be correct, and if their definition of the term "sale" in section 2357 is the proper one, then it must logically follow that a statutory provision concerning the *sale* of public lands does not in any manner affect or refer to a disposition of such lands under the homestead or preemption laws. It is not permissible to refer to section 2357 in construing such laws, and consequently the term "minimum price" in those statutes is a mere jingle of words without sense.

In utter disregard, however, of the consequences flowing from their own reasoning, counsel proceed to admit that section 2357 governs the price of lands under the

homestead and preemption laws, while denying that it has any reference whatever to an entry of land under the desert act. And this is the "reason" assigned for such a contention: That the homestead and preemption laws fix the price of the lands at "the minimum" price; that "minimum price" means nothing unless we refer to section 2357; being *forced* to refer to this odious statute, we *must* do so, and find there that the price of lands within a railroad grant is fixed at $2.50 per acre, and those not in such grant at $1.25 per acre. Counsel then proceed to create an arbitrary definition of the word "minimum" and say that the "minimum" price here means $2.50 for lands within a railroad grant, and $1.25 for lands which are not in such grant. But, say counsel, the desert-land act does not mention the term "minimum" (they have the grace to admit that if the term "minimum" were used in the act then section 2357 would control the price), but fixes the price at $1.25 per acre—which is nothing more than mentioning the minimum price in terms.

Now let it be remembered that section 2357 does not contain the word minimum at all. That section simply provides that no lands shall be sold "for a less price" than $1.25 per acre, and subsequently adds a *proviso* "that the price to be paid" for lands within the limits of a railroad grant shall be $2.50 per acre. To be logical, then, the petitioner should contend that inasmuch as an entry of lands under the homestead and preemption laws is not a "sale" of such lands, and inasmuch as section 2357, Revised Statutes, is inapplicable to them, therefore the term "minimum price" means nothing, and hence the public lands either can not be entered at all under

the homestead and preemption laws, or else, like salvation, they are free and may be acquired "without money and without price." Even to be halfway logical it must follow that the term "minimum price" used in the homestead and preemption laws (according to the position of counsel) must mean the *lowest price* at which lands are offered for sale; and, inasmuch as the acts make no reservation of any special sort of lands, therefore *all* lands, of whatever nature, are subject to entry at the "minimum price," to wit, $1.25 per acre. This is the position they occupy as to the desert act, and it is not perceived why the price of lands under this should be different from that mentioned in the homestead and preemption acts, simply because in the latter acts the price is referred to as the "minimum" price, whereas in the former act the minimum price is mentioned in terms.

Having thus demonstrated, as we think, that section 2357 of the Revised Statutes is "applicable" to *all* methods of acquiring public lands—that it fixes the price of all lands of an agricultural nature (a term used in contradistinction to timber, mineral, and stone lands—see page 1 of this brief) at $1.25 per acre when they do not and at $2.50 per acre when they do lie within the limits of a railroad grant, irrespective of the particular manner or terms by which they are acquired—we come now to inquire whether this provision of the Revised Statutes has ever been altered, amended, modified, or repealed.

By the act of March 3, 1877 (1 Supp. Rev. Stats., 2 Ed., p. 137), Congress made the following provisions:

> *Be it enacted, etc.*, That it shall be lawful for any citizen of the United States, or any person of

requisite age who may be entitled to become a citizen and who has filed his intention to become such, and upon payment of twenty-five cents per acre, to file a declaration with the register and receiver of the land district in which any desert land is situated that he intends to reclaim a tract of desert land, not exceeding one section, by conducting water upon the same within the period of three years thereafter.

At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him.

SEC. 2. That all lands, exclusive of timber and mineral lands, which will not without irrigation produce some agricultural crop, shall be deemed desert lands within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land is situated.

This is the act under which the appellee made his entry on land which is embraced within the limits of a railway grant. Unless this statute is intended, for the purposes mentioned in it, and to the extent to which it goes, i. e. lands of a desert character, to supersede or repeal the proviso of section 2357 of the Revised Statutes, then no authority exists for disposing of public lands lying within the limits of a railroad grant, under its provisions, for a sum less than $2.50 per acre.

It is submitted that section 2357 of the Revised Statutes was neither repealed nor superseded by the desert-

land act of March 3, 1877; that there is no inconsistency between them, and that the price to be paid for lands which are embraced within the limits of a railroad grant is, under both laws, the sum of $2.50 per acre.

The statute contains no words of repeal, either direct or indirect. If repealed at all it must be by implication.

(*a*) Repeals by implication are not favored. The intention to repeal will not be presumed, nor the effect of repeal admitted, unless the inconsistency is clear, unmistakable, and *unavoidable*. On the contrary, it is the duty of the courts to reconcile, if possible, statutes which are seemingly inconsistent, so that both statutes may stand together, unaltered and unimpaired. And all statutes in derogation of existing statutes will be strictly construed.

See Southerland on Stat. Construct., pp. 180, 181, and long list of cases there cited. *Id.*, sec. 148; *Id.*, p. 182.

While it is utterly denied that there is any repugnancy of spirit or principle between section 2357, Revised Statutes, and the desert act, still, even if we concede for the sake of the argument that such is the case, it should be remembered that repugnancy in principle merely between two acts forms no reason why both may not stand; nor is one statute repealed by the repugnant spirit of another.

Ex parte Smith, 40 Calif., 419.
State v. *Macon Co. Ct.*, 41 Mo., 453, 459.
Cass v. *Dillon*, 2 Ohio St., 612.
State v. *Cincinnati*, 19 Ohio, 197.
Southerland Stat. Con., p. 178.

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Cass v. *Dillon*, 2 Ohio St., 612.
State v. *Cincinnati*, 19 Ohio, 197.
Southerland Stat. Con., p. 178.

(*b*) Laws are presumed to be passed with deliberation, and with a full knowledge of all existing laws on the same subject.

Bowen v. *Lease*, 5 Hill, 221, 226.
Landis v. *Landis*, 39 N. J. L., 274–277.
Southerland Stat. Construct., p. 177.

(*c*) The desert land act is an affirmative, not a negative, statute, and it contains no reference whatever to section 2357 Rev. Stats. "Affirmative statutes which contain no reference to existing statutes, either to amend or repeal them, import that the lawmaker has no conscious purpose to affect them, *unless by congruous addition*. On the other hand, when there is inserted in a statute a provision declaring a repeal of all inconsistent acts or parts of acts, there is an assumption that the new rule to some extent is repugnant to some law enacted before."

Southerland Stat. Construction, p. 199.
Bish. W. Laws, sec. 112 *a*.
State v. *Kelley*, 34 N. J. L., 75–77.
Com. v. *Churchill*, 2 Metcalf, 118.
Wilcox Case, 12 Ct. Cls., 495–502.

Wood v. U.S. 16 Pet. 342 862.
U.S. v. Walker, 22 How. 299, 311.

(*d*) All consistent statutes which can stand together, though enacted at different times, relating to the same subject, and hence designated as statutes *in pari materia*, are treated prospectively and construed together, as though they constituted one act. This is true whether the acts were passed at different dates, separated by long or short intervals, at the same session of the legislative body, or on the same day. (See Southerland Stat. Con., section 283 and cases cited.)

The land laws are in pari materia and to be construed together.
Opinions of Atty's Genl, Vol. 2, pp. 444 + 306

Let us apply these four fundamental principles of the law of statutory construction to the statutes in question and see the result.

The act of April 23, 1820 (now forming part of section 2357, Revised Statutes), is the parent of the American public land system. By it provision is made for the absolute sale of public lands, and the price thereof fixed at $1.25 per acre for such lands as do not, and at $2.50 per acre for such lands as do, lie within the limits of a railroad grant.

From time to time since the passage of this act Congress has seen fit to extend the *method of sale* of these lands so as to give the citizens of the United States the full benefit of them and, at the same time, to protect the rights of the Government. Sales on credit having been prohibited (Revised Statutes, sec. 2356), and it being evident that many worthy citizens were prevented from enjoying such lands by reason of their inability to purchase for cash, Congress proceeded to grant relief by providing for certain *conditional* sales by the initial payment of a small sum, the performance of certain conditions, and the extension of credit of from three to five years for the payment of the remainder of the purchase money, possession of the said land in the meantime being given to the purchaser, but the title thereto being reserved by the Government until the conditions are performed and the balance of the purchase money paid. Accordingly we have conditional sales under the conditions of the homestead law, the preemption law, the timber-culture law, and the act concerning desert lands now under consideration.

In none of these acts is the price at which the lands may be entered given, except by reference to section 2357 of the Revised Statutes. The price is referred to as "the minimum price," or "double the minimum price," and it is impossible to determine what sum of money those expressions represent, except by reference to section 2357, Revised Statutes, which is the key to the riddle, thus showing it to be the intention of Congress that the *prices* fixed by that section should govern the new *method* of acquiring lands created by the respective acts. This was admitted in the court below and will, we suppose, be admitted here. But it is contended that the desert-land act reduces the price of land (of that character) to the common price of $1.25 per acre, whether within or without the limits of a railway grant, because that statute mentions the minimum price in terms—$1.25 per acre—instead of referring to that price by the use of the words "minimum price" (which, it is admitted, would have referred only to lands *not* within the limits of a railroad grant, leaving the price of lands that *do* lie within the limits of such grant to be fixed by the proviso of section 2357, Revised Statutes, just as the timber culture and homestead laws did), notwithstanding the fact that the desert land law contains absolutely *no reference whatever to land within the limits of a railroad grant.* Why does it contain no such reference? Because it was not intended to apply to such lands, but to lands without the limits of a grant only.

Why should a man be permitted to buy land within a railroad grant *on credit*, so to speak, at $1.25 per acre, while his neighbor who buys for *cash* is required to pay $2.50 per acre for the same land? To avoid such an

absurd conclusion as this, the courts would be justified in holding that the desert act, inasmuch as it contains no words of repeal, and inasmuch as it refers *in terms* to the price of land *not* within a railroad grant, and to such land only, is applicable only to such land, and that land within the limits of a grant can not be entered under that law. Such a construction is fully justified—if, indeed, it is not *required*—by the laws governing the interpretation of statutes heretofore set forth. The act created a new mode of acquiring public lands, and was, therefore, to that extent, in derogation of the existing statute and must be *strictly* construed against one claiming to acquire land under it. It makes no distinction as to *what* land shall be so liable to purchase, except so far as that distinction may be gathered from the price mentioned. For the reasons mentioned under (*a*) this act must be harmonized with section 2357, Revised Statutes; for the reasons set forth under (*c*) it must be taken as a *congruous addition* to that section, and under the doctrine laid down under (*d*) it must be read, together with that section, as a part of it. When we come to do this, we find that land within a railroad grant can not be sold for less than $2.50 per acre, and that land not within the limits of such a grant can not be sold for less than $1.25 per acre. We then find it provided that land may be bought, under certain conditions as to payment, etc., at $1.25 per acre. No description is given of the land thus offered for sale. Where, then, is such land situated? Why, manifestly, it is situated wherever land can be found that *can be lawfully sold at* $1.25 *per acre.* Where is that? Land *not* embraced within the limits of a railroad grant, and *no others.*

This construction is presented to the court as being well worthy of its consideration. I am unable to perceive any good reason why it should not be adopted as the true meaning and intent of the desert land act of 1877.

The very most, however, that can possibly be claimed under this act is that it offers for sale, under the conditions therein mentioned, both lands within and without the limits of a railroad grant, at the respective prices mentioned in section 2357.

But there is another and even more potent reason why the desert land act should not be given the construction which has been placed upon it by the Court of Claims.

The price of the alternate sections, which the Government reserved to itself in the acts making these grants to railroads, was fixed at $2.50 per acre in the very act in which the grant to the railroad was made. For example, take the grant to the Northern Pacific Railroad (13 Stats., 369). In that act it is provided:

> And the reserved alternate sections shall not be sold by the Government at a price less than $2.50 per acre.

And so in the grant to the Oregon Central Railroad Company it is provided (16 Stats., 94):

> And thereafter the remaining public lands, subject to sale within the limits of said grant, shall be disposed of only to actual settlers at double the minimum price for such lands.

Now, these recitals are in the nature of contracts between the United States and the respective railroad companies. It was greatly to the interest of the Government to have these railroads built, both for the industrial

and commercial development of the country, and in order that the Government might use them as military and as post roads, all the acts providing for such use. To induce private capital, therefore, to invest in these enterprises, the Government virtually said to these corporations: "If you will put your money into these roads the Government will help you. We will not only give you every other section of land along the line of your road within 40 miles of it, but we will make that land worth something to you. We will make it worth at least $2.50 per acre to you by contracting with you not to dispose of *our* land in the same vicinity for less than that sum."

Such was the contract, the promise, the inducement. And upon this contract—this promise thus held out to them as an inducement—the corporation relied and went ahead and built their road. In reliance on the same contract, thousands of people have bought the bonds of the railroads and purchased and settled on their lands. And now, behold the appellee is asking the highest court of the United States to so construe a statute as to result in the repudiation of the contractual duties of the Government, a violation of its promise in solemn statute asserted, and a sinking of the legislative branch of the American Republic to the level of a common cheat!

The effect of a new statute in conjunction with other statutes, with reference to established institutions, systems, and policies, is always in view; and it is presumed that there is no intention to affect them, unless the plain and unambiguous words of the new statute require it.

Greenhow v. *James*, 80 Va., 636.
Baxter v. *Tripp*, 12 R. I., 310.

Supervisors v. *Brogden*, 112 U. S., 261.
Attorney-General v. *Smith*, 31 Mich., 359.
Burnham v. *Onderdonk*, 41 N. Y., 425.
Lindsay v. *Rottaken*, 32 Ark., 619.

In consideration of the provisions of any statute, they ought to receive such a reasonable construction, if the words and subject-matter will admit of it, as that the existing rights of the public or of individuals will not be infringed.

Wales v. *Stetson*, 2 Mass., 146.

Considerations of what is reasonable, convenient, or causes hardship or injustice have a potent influence in all cases. It is always assumed that the legislature aims to enact only what is reasonable and just. Therefore, when any suggested construction necessarily involves a departure from this aim it will not be adopted if any other is possible by which such pernicious consqeuences can be avoided.

Allen v. *Savannah*, 9 Georgia, 286.
Bridge v. *Branch*, L. R., 1 C. P. Div., 633.
See also *Board of Works* v. *Spackman*, L. R., 13 Q. B. Div., 878.
Lombard v. *Trustees*, 73 Georgia, 322.
Collins v. *Corman*, 5 Md., 503.
Griffin's Case, Chase's Dec., 364.

All statutes are conclusively presumed to have been passed from good motives, and that they were not intended to bring about fraudulent results.

Wright v. *Defrees*, 8 Ind., 298.
People v. *Shepheard*, 36 N. Y., 285.
Ex parte Newman, 9 California, 502.
U. S. v. *R. R. Co.*, 142 U. S., 510–544, 545.

For these reasons, then, if for no others, this court should not give a construction to the desert-land act that will operate as a violation of the Government's promise and a fraud upon railroad companies. For while, in the particular case at bar, the act granting the land to the Southern Pacific Company does not appear to contain the usual promise that the Government will not dispose of the alternate reserved sections for less than $2.50 per acre, yet such a promise has been made to many other corporations, as has been shown; and hundreds upon hundreds of cases are now pending or threatened in the Court of Claims (which will be governed by the decision in this case) in which claimants, whose lands *are* within the limits of such grants, are making the same claim that is being made here by this appellee.

II.

THE APPELLEE IS NOT ENTITLED TO RECOVER THE MONEY PAID.

For the purposes of this division of the argument we may concede the contention of the appellee that the desert-land act authorized sale of this land at $1.25 per acre, and that the excess over that price was erroneously charged and paid under a mistaken construction of the law. Even admitting this contention to be true, we still insist that the money so paid can not be recovered, for the reason that it was paid freely and voluntarily, without protest or objection, with a full knowledge of all the facts, uninfluenced by any misrepresentation, fraud, coercion, or duress, without any real or imaginary exercise of

power on the part of the land officers, and when the appellee, had he doubted the correctness of the payment, had other immediate means of relief at hand other than making the payment. Money paid under such circumstances is, in the completest sense, a voluntary payment, and is not recoverable.

The right of one to recover back money paid to another who is not rightfully entitled thereto and can not in equity and good conscience retain it, is an exceptional one and closely watched, and only arises out of two classes of transactions; first, where the party, although he pays it voluntarily and without objection, does so under a mistake of fact; and, secondly, where, knowing the facts and knowing or suspecting the law, he makes protest and only pays under compulsion or duress, which the other party, by reason of his position, is able to exercise over either the person or property of the payor.

The two classes are perfectly distinct, and a given transaction must belong exclusively to one or the other, and being located, only confusion results from an attempt to examine into the existence of these elements which are material only to those of the other class.

Therein consists the vice of claimant's argument in this case, and in a measure of the majority opinion of the Court of Claims.

The claim here falls wholly within the first class, namely, that of a payment entirely voluntary, without thought or knowledge of any unlawfulness of the demand. As a result, it is entirely immaterial that he did not protest, and also immaterial whether the party receiving the

money was in a position to coerce. Protest and coercion are both impossible accompaniments of a payment voluntarily made by one who believes he ought to make it.

Supposing, then, that $1.25 per acre was the lawful price of the land, and the claimant, believing such price to be $2.50, paid that sum by reason of such erroneous belief. He wholly fails to show a case for recovery back. It is not enough that the receiver ought not in equity or good conscience to retain the money, as the court below seemed to think; that condition is cumulative to the additional one that the money must have been paid by reason of a mistake of fact, and the latter is just as essential a condition as the former.

Although there are a few dicta of judges to the contrary, the current and weight of authorities clearly establish the position that where money is paid with a full knowledge of all the facts and circumstances upon which it is demanded, or with the means of such knowledge, it can not be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not. He shall not be permitted to allege his ignorance of the law, and it shall be considered a voluntary payment. This position is broadly stated by *Buller, J.*, in *Lowry* v. *Bourdien* (Dougl., 470) without any question or the expression of any doubt or disapprobation by the rest of the judges, Lord Mansfield and Mr. J. Ashurst.

In *Knibbs* v. *Hall* (1 Esp. N. P. Cas., 83) a tenant was not permitted to recover back from his landlord or to be allowed by way of set off a sum of money which he had

paid beyond the rent actually due from him on the supposition that he must otherwise suffer distress. In *Brown* v. *McKinnally* (1 Esp. N. P. Cas., 279) and *Mariott* v. *Hampton* (2 Esp. N. P. Cas., 546) the same principle was recognized.

In *Buller* v. *Harrison* (Cowp., 555) the money was paid under a mistake of *fact*, and the case went on that reason.

In the case of *Bilbie* v. *Lumley* (2 East, 469) Lord *Ellenborough* said he had never heard of a case in which a party who had paid money to another voluntarily, with a full knowledge of all the facts of the case, had been permitted to recover it back on account of his ignorance of the law, except the case of *Chatfield* v. *Paxton* (in a note to *Bilbie* v. *Lumley*, *supra*), in which Lord *Kenyon*, at *nisi prius*, had dropped an intimation of that sort. Now upon examination it will be found that in the case of *Chatfield* v. *Paxton* a majority of the judges put the case upon the ground that the payment had been made by the plaintiff, not with a full knowledge of the facts, but only under a blind suspicion of the case. Lord *Ellenborough* says that it was so doubtful on what point the case turned that it was not ordered to be reported.

In the case of *Brisbrane* v. *Dacres* (5 Taunt., 144) this subject was elaborately considered by the court of common pleas, and the principles of *Bilbie* v. *Lumley* recognized and upheld. *Brisbrane*, who was the captain of a frigate belonging to a squadron under the command of Admiral Dacres, received from the Government $850 for freight of certain public moneys, and from the Bank of England upward of £7,000 for freight of money of individuals.

He paid over to the admiral one-third of the sums thus received, under the belief that he was legally entitled to it; but upon discovering that he was not, he brought this action to recover it back. It was shown to be the usage in the Navy for the captains of vessels carrying public and private treasure to pay one-third of the freight for the same to the commander of the squadron to which they belonged, though it was admitted that the admiral had no legal claim to any portion of the allowance. But the court held that the money having been paid with a full knowledge of all the facts and circumstances of the case could not be recovered back because it had been paid under a misapprehension of the law. Mr. Justice Gibbs says that "where a man demands money of another as a matter of right, and he pays it with a full knowledge of the facts upon which the demand is founded, he can never recover back the sum he has so voluntarily paid. By submitting to the demand, he that pays the money gives it to the person to whom he pays it and closes the transaction between them. He who receives it has a right to consider it as his without dispute; and it would be most mischievous and unjust if he who has acquiesced in the right by such voluntary payment should be at liberty at any time to rip the matter up and recover back the money."

The proposition of Lord *Mansfield*, in *Bize* v. *Dickerson*, was that "where money is paid under a mistake which there was no ground to claim in conscience, the party may recover it back in an action of assumpsit." If his lordship meant a mistake *of fact*, the proposition is

undoubted; and that he did so mean and express himself, Mr. Justice *Gibbs*, in his opinion in *Brisbrane* v. *Dacres*, infers, with great force, from the circumstance that Lord *Mansfield*, a few years before, in *Lowry* v. *Bourdieu*, heard it said by Mr. Justice *Buller* that "money paid in ignorance of law could not be recovered back," and had not dissented from the doctrine, and *Buller*, J., sat by him in *Bize* v. *Dickerson*, and would not have heard the contrary of that doctrine stated without noticing it.

If money paid under a mistake of the law, though with a full knowledge of the facts of the case, can be recovered back in all cases where the party to whom it is paid is not in conscience and equity entitled to it (as is said in the opinion delivered in the court below), then what is the practical distinction between a mistake of *fact* and a mistake of *law?* A person who has paid money under a mistake of *fact* can not recover it back unless he is equitably entitled to it. The inquiry in every case, therefore, would be, not whether the money was paid under a misapprehension of the law or in ignorance of fact, for this is immaterial, but whether the person to whom it was paid can in equity and conscience retain it. If he can not, if there was *any mistake of any character*, he shall refund—for such a doctrine necessarily destroys all distinction beween mistakes of law and mistakes of fact. If this be so, why has the question been so frequently and elaborately discussed in the English and American courts, and not only in courts of common law but in courts of equity? How are the cases of *Bilbie* v. *Lumley* and *Bisbrane* v.

Dacres, and hundreds of cases like them, to be reconciled with this principle? What ground of conscience or equity had Admiral Dacres for retaining the money paid to him? He had neither incurred hazard nor rendered any labor or service in its transportation. Capt. *Brisbrane* was not his servant, nor was the ship which carried it his property.

This doctrine is applicable to a mistake of *fact*, but it is utterly inapplicable to a mistake of *law*. The policy of the law and the necessities of civilized society do not require that a man shall not be relieved of a mistake of *fact*, and hence if one pays money to another in mistake of *fact* and that other is not in equity and good conscience entitled to have it, he may recover it back. But the policy of the law and the necessities of civilized society do require that a man shall know the law and that he shall not be eternally opening consummated transactions because of an alleged want of knowledge of it. "Courts do not undertake," says Chancellor Kent in *Lyon* v. *Richmond* (2 John. Chy., 51) "to relieve parties from their acts and deeds, fairly done, on a full knowledge of the facts, though under a mistake of law. Every man is charged at his peril with a knowledge of the law; there is no other principle which is safe or practicable in the common intercourse of mankind." And this principle—without which modern business would soon become paralyzed and the courts overwhelmed with a deluge of litigation—this principle is not confined to the *criminal* law, as the learned chief justice of the Court of Claims seems to think. It is just as rigidly enforced in civil as it is in criminal cases, as was expressly said in *U. S.* v. *Cargo of Sugar*, 3 Sawyer, 46.

The doctrine of these leading cases has been adopted most fully by this court in a great variety of cases—

Elliott v. *Swartout*, 10 Pet., 137–152.
Bend v. *Hoyt*, 13 Ib., 262.
Morris v. *Traver*, 1 Dal., 147.
Waples v. *U. S.*, 110 U. S., 630–632.

Little v. Bowers, 134 U.S. 547

Carney v. Rickard, 157 U.S. 352

The distinction between mistakes of law and mistakes of fact is too well known to require argument. (2 Pom. Eq., 2 ed., sec. 840–41.) The principle upon which courts refuse to relieve against mistakes of law is, that in the judgment of law *there is no mistake*; every man being held, for the wisest reasons, to be cognizant of the law. The act, therefore, against which the party seeks relief is his own voluntary act, and he must abide by it. *This principle steers entirely clear of conscience or the equity of the transaction.*

Nott, J., in delivering his dissenting opinion in the court below, put the true rule tersely when he said:

> The rule is not a technicality, but a principle, that where a matter is closed voluntarily, without fraud or mistake [of fact], it must stay closed. That a completed business transaction can be torn up for no better reason than that the judiciary differ from the executive in the construction which should be given to a statute seems to me a proposition which should be dropped as soon as stated.

The principles above announced are fully sustained by the decisions of this court. In *Lamborne* v. *County Commissioners* (97 U. S., 181–185) the court say:

> A voluntary payment, made with full knowledge of all the facts and circumstances of the case, though

made under a mistaken view of the law, can not be revoked, and the money so paid can not be recovered back.

In referring approvingly to this case Chief Justice Waite, in *Railroad Co.* v. *Commissioners* (98 U. S., 541–543), says:

> As that case came from Kansas, we followed the rule adopted by the courts of that State, which is thus stated in *Wabaunsee County* v. *Walker* (8 Kans., 431): "Where a party pays a demand with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and can not be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary." This, as we understand it, is a correct statement of the rule of the common law.

In addition to the leading cases already reviewed, the following may be referred to as fully supporting the doctrine announced:

> *Clark* v. *Dutcher*, 9 Cow. (N. Y.), 74 (where the English and American authorities are elaborately reviewed).
> *Benson* v. *Monroe*, 7 Bush. (Mass.), 125.
> *Edge* v. *Koontz*, 8 Pa. St., 109.
> *Bailey* v. *Paulina*, 69 Iowa, 463.
> *Thompson* v. *Daty*, 72 Ind., 336.
> *Regan* v. *Baldwin*, 126 Mass., 485.
> *Ins. Co.* v. *Stewart*, 95 Ind., 586.
> *Hipp* v. *Crenshaw*, 64 Iowa, 404.
> *Hare* v. *U. S.* 9 Ct. Cls., 270.

R. R. v. *Thomas*, 85 Ill., 464.
Comstock v. *Tupper*, 50 Vermont, 596.
Milnes v. *Duncan*, 6 Barn. and Cres., 671.
R. R. Co. v. *Commissioners*, 98 U. S., 541, 543.
Philadelphia v. *Collector*, 5 Wall., 720–731, 732, Div. 5.
Collector v. *Hubbard*, 12 Wall., 1–13, Div. 6.

The above have been selected from the great mass of cases on the subject of voluntary payments because they are direct adjudications upon that issue, and as illustrations of the doctrines laid down in the text of the brief. The list might be almost indefinitely extended if the cases wherein the doctrines are incidentally recognized and upheld were cited; but such a course could subserve no good purpose and they are accordingly omitted.

As we have said, the rules governing the second class of cases can have no application here. The fact, if it existed, that the parties did not stand equal is wholly immaterial, although attempted to be urged as a sort of makeweight both by claimant and the court below.

This second class of cases involve as essential characteristics knowledge, or at least suspicion, of his rights by the payor, and resistance, or at least reluctance, to pay on his part, accompanied by insistance on the part of the receiver clothed with some power of compulsion. (*Maxwell* v. *Griswold*, 10 Howd., 242–256.)

In case at bar there was no reluctance, and therefore whether the receiver had power to coerce is immaterial; that power did not bring about the payment.

The case of *Bailey* v. *Paulina* (69 Iowa, 463) presents an illustration. There plaintiff, found guilty of breach

of an ordinance, believing the ordinance and conviction valid, paid his fine while under actual arrest. Upon the ordinance being declared invalid he sued to recover back the fine. Notwithstanding all the opportunity of coercion, the court held he could not recover, for the reason that the payment was caused, not by coercion, but by plaintiff's mistake of law.

The court below seemed to labor under the impression that for some indefinable reason the fact that claimant was dealing with a Government official destroyed the voluntary character of the transaction. This court has repeatedly, notably in tariff cases, held such fact to be utterly immaterial if, as in this case, claimant paid without objection.

The case of *Elliott* v. *Swartout* (10 Pet., 137–152, 153) is an illustration. There an importer paid duties supposed at the time both by himself and the collector to be lawful, so that no objection or reluctance characterized the transaction on the one side nor insistance or coercion on the other, although, of course, the collector, being in possession of payor's goods, had plenary power of legal coercion. The court, utterly ignoring the lack of equality in the respective parties and the official character of the collector, applied exactly the same rules of law applicable to a payment between private individuals made under mistake of law, as we have stated them above.

In some of the cases we find the expression that, in order to render a payment voluntary, "the parties must stand upon equal terms." The learned counsel for the appellee has seized upon this isolated expression with

great avidity, and so tortured and misconstrued it as to attempt to induce the court to believe that two men can not stand upon equal terms in a business transaction if one happens to be an agent of the United States. It is scarcely necessary to assert to an intelligent mind that such an absurd proposition was never conceived of by the judges who have made use of this expression. What do courts mean when they say that in order to make a payment voluntary the parties to the transaction must "stand upon equal terms?" Why, simply this and nothing more, that the parties must deal fairly, and without deceit or oppression; that there must be no duress operating upon the one, and no fraud or oppression practiced upon the other. The expression was never designed or intended to limit, qualify, or deny the thoroughly well-settled doctrine concerning voluntary payments as I have announced it. The expression simply goes to the *fact* of whether a payment was or was not voluntary. If the payment was made uninfluenced by deceit, fraud, duress, or oppression, then it was a voluntary one, if made with a knowledge of the *facts*, and can not be recovered. This is the fullest and fairest statement of the doctrine that can be made. No case has ever gone further than this. Such is the doctrine of this court. In *Raddish* v. *Hutchins* (95 U. S., 210) this court says:

> Coercion or duress, to render a payment involuntary, *must consist of some actual or threatened exercise of power*, possessed, or believed to be possessed, by the party exacting payment over the person or property of another *from which that other has no immediate means of relief* except by *making payment.*

In *Wabaunsee Co.* v. *Walker* (8 Kans., 431), it is said:

> Where a party pays a demand with a full knowledge of all the *facts* which render such demand illegal, without an *immediate* and *urgent* necessity therefor, or to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and can not be recovered back.

This case was approved of by this court in *Railroad Co.* v. *Commissioners* (98 U. S., 541–543), in which Chief Justice Waite adopts the above language.

The same principle is adhered to in—

Benson v. *Monroe*, 7 Cush., 125.
Clark v. *Dutcher*, 9 Cow., 674.
Wolfe v. *Marshall*, 52 Mo., 157.
Hall v. *U. S.*, 9 Ct. Cls., 270.
Delvin v. *U. S.*, 12 Ct. Cls., 266.
White v. *Quincy*, 63 N. Y., 370.
Bailey v. *Paulena*, 69 Iowa, 463.
Thompson v. *Doty*, 72 Ind., 336.
Hepp v. *Crenshaw*, 64 Iowa, 404.
Insurance Co. v. *Stewart*, 95 Ind., 588.

and, indeed, in all the cases on this subject that I have cited in this brief.

In *Benson* v. *Monroe* (7 Cush., 125, 131) Metcalf, *J.*, says:

> The court deem this a plain case. It is an established rule of law that if a party, with a full knowledge of the facts, voluntarily pays a demand unjustly made on him, * * * he can not recover back the money as paid by compulsion, unless there be fraud in the party enforcing the claim and a knowledge that the claim is unjust. And the case is not

> altered by the fact that the party so paying protests that he is not answerable, and gives notice that he shall bring an action to recover the money back. He has an opportunity in the first instance to *contest the claim at law. He has, or may have, his day in court;* he may plead and make proof that the claim on him is not such as he is bound to pay.

Such cases might be multiplied almost without number, for the books are full of them. The above, however, are deemed sufficient. The law on this subject may be fairly, fully, and honestly summarized as follows:

(1) Money voluntarily paid with a full knowledge of all the facts can not be recovered.

(2) All payments are voluntary which are not brought about by fraud, deceit, duress, or oppression, when there is no duress operating upon the one, nor fraud nor oppression practiced by the other.

(3) If fraud, duress, or oppression be pleaded, it must be shown to be fraud, duress, or oppression from which the person making the payment has no immediate means of relief, except by making payment.

(4) If any other means of relief is at hand, as, for example, the litigation of the question in the courts, such means of relief must be resorted to; and if not resorted to, the plea of fraud, duress, or oppression will not avail.

Let us now apply the admitted facts of the case at bar to these thoroughly well settled and incontrovertible doctrines of the law.

On February 5, 1889, the appellee filed at the local land office a declaration of his intention to reclaim a tract of land (under the provisions of the act of March 3, 1877),

situated within the limits of a grant heretofore made to the Southern Pacific Railroad, paying the local land officers, without any objection or protest or effort to avoid such payment, the sum of $319.60, which was 50 cents per acre for said land. September 21, 1891, the appellee (having complied with the provisions of the desert-land act as to conducting water on the land, etc.) made final proof on his entry and paid to the local land officer, still without objection, protest, or effort to avoid such payment, the sum of $1,278.40, which made a total of $2.50 per acre for the land so taken up.

It is not denied that the appellee had full knowledge of all the facts. The findings do not show and it is not pretended that the payments were induced by any fraud, deceit, duress, or oppression on the part of the local land officers.

Can there be any question about the payment being voluntary?

There was no exercise of power, either actual or threatened, in the case at bar. None is mentioned in the findings of fact, or claimed in the petition, or anywhere asserted in the case. On February 5, 1889, when the petitioner first went to the local land office to "enter" (that is, to purchase) this land, he was informed that it was within the limits of a railroad grant and that the price of it was $2.50 per acre.

This simple proposition was before him: Here is land which the Government offers for sale at $2.50 per acre. Shall I buy or not? Yes, I like the land; the price is satisfactory, and I will buy. He did so, received his

patent, and entered into possession. The transaction was consummated and completed without any fraud, accident, or mistake, and it is and ought to be forever closed. Courts are not established for the purpose of upsetting consummated transactions, complete executed contracts, merely because one of the parties subsequently becomes dissatisfied with his bargain. This man was offered land at a given price. He, being satisfied with the land and the price, bought it and took a deed; and now, behold, he comes into this court and asks that the vendor be required to refund him one-half of the purchase money, because he now thinks the law authorized the land officers to sell to him at a less price. There is no element of fraud, accident, or mistake; no element of compulsion or duress in the case. None is alleged or proven. His only ground of complaint is excessive price—inadequacy of consideration. I need scarcely remind the court that inadequacy of consideration (unless so gross as to amount to fraud) is not a ground for the rescission of a contract or of otherwise interfering with an executed agreement, even in a court of equity, much less in a court of law. To use the language of Rogers, J. (*Hind* v. *Holdship*, 2 Watts, Pa., 104): "There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a contract."

In accord:

Walford v. *Powers*, 85 Ind., 294.
Williams v. *Jenson*, 75 Mo., 681.
Lawrence v. *McCalmont*, 2 How. (U. S.), 426–452.
Worth v. *Case*, 42 N. Y., 362, 369.
Train v. *Gold*, 5 Pick. (Mass.), 384.
Giddings v. *Giddings*, 57 Vt., 227.

A contract can only be rescinded when the entering into the same has been induced by a false representation, fraudulent or otherwise, made by a party thereto, provided such representation be one of *fact*, as distinguished from matters of law or of mere intention, upon which the party has a right to rely, and does rely, as a part of the transaction. Tested by these principles, the petitioner would have no standing in a court of equity under a bill filed to set aside this transaction, and he has even less standing in a court of law for the recovery of a portion of the purchase money.

It can not be the province of a court of law to evade the law and to invent excuses to accomplish that illegitimate and illogical end which some people are pleased to term "substantial justice," but which is not justice at all, but a farce and a confusion. Courts are not established to deal out what they may think is "substantial justice," but to enforce the law as it is. "Substantial justice" may be safely left to the legislative branch of the Government, where it properly belongs. It can not be the duty of a court that sits to administer law, and for no other purpose, to be curious and subtle and astute, or to invent reasons and make efforts in order to escape from the rules of law. To do this is to sacrifice to the apparent right of one party in one case that steadfast adherence to law and principle which constitutes the only protection and defence of all rights and of all parties. If, as the majority of the Court of Claims seems to think, "equity and good conscience" require that the Government should refund this money to the appellee, notwithstanding the positive rules

of law which prohibit the *courts* from doing it, let the appellee go to the halls of Congress with his plea where it will doubtless receive such attention as it deserves. But a court of law is not the proper forum for such a plea. They have no ears for such a cry. They have to do, not with *conscience*, but with *law*, and with law only.

This argument has already grown to such proportions that room does not remain to notice in detail all the cases cited by the appellee and in the opinion of the court below. But I have examined each one of them, and I do not hesitate to say that the court will not find one of them to in any wise controvert the doctrines that I have laid down; but, on the contrary, while the *facts in those particular cases* are not such as to warrant their *application*, the cases recognize in the fullest degree the *principles* for which I contend. They simply present cases in which the *facts* are not such as to make a voluntary payment. Two examples of this will be sufficient.

The first is the case of *United States* v. *Lawson* (101 U. S., 164). It is a case in which a subordinate officer sues for certain fees of which he had been wrongfully deprived by his superior officer. It is a question of submission to authority. It involves no question of "payment," in the proper sense of that word here, at all. The plaintiff's superior commanded him to turn into the Treasury certain fees which he had collected, and which he claimed as his own. He had no alternative and must obey. Says Mr. Justice Clifford, on page 169 of the opinion:

> Confessedly the order was official and peremptory, and under such circumstances it may well be inferred

> that the party felt that, if he refused to obey, the refusal would cost him his commission. Had he refused to comply with the order or entered a protest, his act might have been regarded as contumacious, and have proved as injurious in its consequences to the incumbent of the office as if he had declined to discharge the ordinary duties.

Further comment is unnecessary.

The second case is that of *Swift Company* v. *United States* (111 U. S., 22). This is a case of the payment of an illegal tax under force and duress. It is the very embodiment of the exception above mentioned, but is utterly inapplicable to the case at bar. On page 29 of the opinion Mr. Justice Matthews says:

> The appellant had no choice. The only alternative was to submit to an illegal exaction or discontinue business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with under *such pressure* has never been regarded as a voluntary act within the meaning of the maxim *volenti non fit injuria.*

Neither of these cases were properly assumpsit for money had and received, but were for balances due on accounts claimed to have been stated on erroneous principles, and for money in the hands of the Government at the time of stating the accounts.

SUMMARY.

Wherefore it is respectfully submitted:

First. That the law, as revised and embodied in section 2357 of the Revised Statutes, fixes the price of all

lands of an agricultural character, as contradistinguished from mineral, coal, timber lands, etc., that lie within the limits of any grant to any railroad at $2.50 per acre, irrespective of the method in which they are acquired from the Government, and that price was properly and lawfully charged to and paid by the appellee for the lands purchased by him.

Second. That said section 2357, Revised Statutes, has not been altered, repealed, or superseded by the desert land act of 1877, and that it still exists as the parent of the public land system; that said desert land act must be regarded as a *congruous* addition to said section 2357, must be taken as a part thereof and made to harmonize therewith; that the said desert land act only refers to lands which do *not* lie within the limits of a railway grant, or, at the very best, extends the *method* of purchase to both kinds of lands at the price fixed by the former statute.

Third. That the payment made by the petitioner in this case was a voluntary one in all respects, made with a knowledge of all the facts, uninfluenced by any exercise of power or coercion, and can not be recovered.

It follows that the judgment of the Court of Claims is erroneous and that the same should be reversed, with instructions to dismiss the petition.

J. E. DODGE,
Assistant Attorney-General.
GEORGE H. GORMAN,
Assistant Attorney.

APPENDIX.

Table of land grants.

State or corporation to which grant was made.	Name of railroad.	Date of act making grant and acts extending time for completion of road.	Statutes.	Page.
Florida	Pensacola and Georgia	May 17, 1856	11	15
	Florida, Atlantic and Gulf Central	do	11	15
Missouri	St. Louis, Iron Mountain and Southern	July 4, 1866	14	83
Michigan	Port Huron and Lake Michigan	June 3, 1856	11	21
	Jackson, Lansing and Saginaw	do July 3, 1866	11 14	21 78
Wisconsin	West Wisconsin, now Chicago, St. Paul, Minneapolis and Omaha.	June 3, 1856 May 5, 1864 July 13, 1868	11 13 15	20 66 257
Minnesota	St. Vincent Extension St. Paul and Pacific, now St. Paul, Minneapolis and Manitoba.	Mar. 3, 1857 July 12, 1862 Mar. 3, 1865 Mar. 3, 1873	11 12 13 17	195 624 526 631
	Brainerd Branch, St. Paul and Pacific, now Western Railroad.	Mar. 3, 1857 Mar. 3, 1865 Mar. 3, 1873	11 13 17	195 526 631
	Southern Minnesota Railway Extension.	July 4, 1866	14	87
	Hastings and Dakota	do	14	87
	Lake Superior and Mississippi	May 5, 1864	13	64
New Orleans, Baton Rouge and Vicksburg.	New Orleans Pacific, assignee	Mar. 3, 1871	16	573
Oregon and California.	Oregon and California	July 25, 1866 June 25, 1868	14 15	239 80
California and Oregon.	California and Oregon	July 25, 1866 June 25, 1868	14 15	239 80
Atlantic and Pacific.	Atlantic and Pacific	July 27, 1866	14	292
Mississippi	Gulf and Ship Island	Aug. 11, 1856	11	30
	Tuscaloosa to the Mobile Railroad	do	11	30
Alabama Louisiana	Mobile to New Orleans do do	do	11	30
Alabama	Coosa and Tennessee	June 3, 1856	11	17
	Coosa and Chattanooga	do	11	17
	Memphis and Charleston	do	11	17
	Elyton and Beards Bluff	do	11	17
	Savannah and Albany	Mar. 3, 1857	11	195
Louisiana	New Orleans to the State line in the direction of Jackson, Miss.	June 3, 1856	11	18
Arkansas	Iron Mountain	July 4, 1866	14	83

Table of land grants—Continued.

State or corporation to which grant was made.	Name of railroad.	Date of act making grant and acts extending time for completion of road.	Statutes.	Page.
Alabama	Selma, Rome and Dalton	June 3, 1856	11	17
	Mobile and Girard	do	11	17
Michigan	Marquette and Ontonagon	do	11	21
		June 18, 1864	13	137
		May 20, 1868	15	252
	Northern Central Michigan	June 3, 1856	11	21
		July 3, 1866	14	78
Iowa	Sioux City and St. Paul	May 12, 1864	13	72
Wisconsin	Wisconsin Central	May 5, 1864	13	66
		Apr. 9, 1874	18	28
Oregon Central	Oregon Central	May 4, 1870	16	94
Southern Pacific.	Southern Pacific (main line)	July 27, 1866	14	292
Texas Pacific	Texas and Pacific	Mar. 3, 1871	16	573
		May 2, 1872	17	59
Florida	Atlantic, Gulf and West India Transit	May 17, 1856	11	15
Louisiana	Vicksburg, Shreveport and Texas	June 3, 1856	11	18
Michigan	Ontonagon and Brule River	do	11	21
Wisconsin	North Wisconsin, now Chicago, St. Paul, Minneapolis and Omaha.	do	11	20
		May 5, 1864	13	66
Northern Pacific.	Northern Pacific	July 2, 1864	13	365
		May 7, 1866	14	335
		July 1, 1868	15	255
		Apr. 10, 1869	16	57
		May 31, 1870	16	377

DEC 18 1894
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 708.

THE UNITED STATES, Appellant,

vs.

BENJAMIN HEALEY.

BRIEF FOR APPELLEE.

HARVEY SPALDING,
Attorney for Appellee.

H. L. McQUEEN, PRINTER.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

UNITED STATES, Appellant,
vs.
BENJAMIN HEALEY. } No. 708.

Price of Desert Lands Entered Under the Act of March 3, 1877.

Exaction of Double the Legal Price by the Commissioner of the General Land Office.

BRIEF FOR APPELLEE.

This case comes up on appeal by the Government from the judgment of the Court of Claims in favor of the appellee for the sum of $799. The claimant brought suit in that court for the sum of $1.25 per acre overcharged him on his entry under the Act of March 3, 1877, known as the desert land law, and the court gave judgment for the same, holding that the price of lands entered under that act was $1.25 per acre for all lands whether situated within or outside of a railroad grant, and that the charge of $2.50 per acre by the Commissioner of the Land Office was an illegal exaction and recoverable by suit in that court. On appeal, as in the court below, there are but two questions to be argued. First, as to the price of lands entered under the Act of March 3, 1877, and second, as to the right of recovery on overpayments made under the circumstances shown by the record.

The record shows (finding 4 and 5, p. 9), that the appellee filed a declaration under the Act of March 3, 1877, on the 5th day of February, 1889, setting forth his intention to reclaim a tract of land containing 639.20 acres, and that he paid on the same day the sum of $319.60, or 50 cents per acre, for the said land; and that

on the 21st day of September, 1891, he paid the additional sum of $1,278.40, being $2.00 per acre, for the said land, making in all $2.50 per acre, being required by the officers of the United States Land Office to pay the said sums. The act under which the entry was made makes it lawful to make an entry on payment of 25 cents per acre, and to make final proof and to obtain a patent on the payment of an additional sum of $1.00 per acre, but the Commissioner of the General Land Office attempted to justify the charge of 50 cents per acre on filing the declaration and of $2.00 per acre on making final proof on the ground that the land was double minimum land and subject to the proviso of Section 2357, Revised Statutes, fixing the price of lands within the limits of a railroad grant at $2.50 per acre. The Court of Claims held with the claimant that this contention was erroneous and that the price of desert lands was $1.25 per acre as fixed by the Act of March 3, 1877.

That there was no error in this decision is apparent merely from an examination of the Act of March 3, 1877. Being aware that in certain kinds of entries double the ordinary charge was made by law for lands within the limits of a railroad grant, Congress in enacting the Act of March 3, 1877, made no such distinction. A new method of obtaining possession of the public lands was created, and everything that was necessary to be done by the entryman was described and provided for in the act. The price to be paid was fixed, the work to be done was fixed, and the time within which it was to be done was fixed, and all without reference to the distinction between minimum and double minimum lands. Since no such distinction is made in the act it is obvious that for entries under the Act of March 3, 1877, it was never intended to make any such distinction. The reason is plain. The lands whose disposition was provided for in the Act of March 3, 1877, were desert lands, not capable of producing any agricultural crop, which had not been taken up, and could not be under the pre-emption and homestead laws. To dispose of these lands and as an aid to the settlement of the country special inducements were offered in the Act of March 3, 1877. Six hundred and forty acres could be entered. No actual residence was required as under the homestead and pre-emption laws, so that capitalists from other States could invest their money in the redemption of these lands from their waste condition, and finally, where the lands were within limits of a railroad grant, as the great portion of them were, they could be acquired at $1.25 per acre instead of $2.50 per acre charged under the pre-emption and commuted homestead laws. So plain is it that the only price that can be charged for lands entered under the act is the price named in the act, that for over ten years after its passage no other price was charged, nor, so far as we know, thought of by any person. The record shows that it was not until June, 1887, that a different construction was adopted and the entries under the Act of March 3, 1877, assimilated in price to

pre-emption entries. And the record also shows (finding 3, p. 8) that on January 13, 1892, this second construction was abandoned, and the original practice resumed, so that the office, originally responsible for the claim that the price of desert lands was fixed by law at $2.50 per acre, when within the limits of a railroad grant, no longer holds to that idea. Still, for the purpose of showing that the section 2357, R. S. which is given as the authority of the charge of the $2.50 per acre in this case never had any applicability to the entry, we will make an examination of that section.

Section 2357 reads as follows:

"The price at which the public lands are offered for sale shall be one dollar and twenty-five cents an acre; and at every public sale the highest bidder, who makes payment as provided in the preceding section, shall be the purchaser; but no land shall be sold, either at public or private sale, for a less price than one dollar and twenty-five cents an acre; and all the public lands which are hereafter offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land-office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry: Provided, that the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of Congress, shall be two dollars and fifty cents per acre."

This section merely fixes the price of lands when offered at public sale, or subject to private entry. When lands are offered at public sale the reserved price is, under this section, $1.25 per acre, when not within a railroad grant, and $2.50 per acre when within such grant, and those lands not sold at the public sale are subject to entry at $1.25 per acre when without, and $2.50 per acre when within a grant. The section is taken from the original Act of April 24, 1820, and the proviso is simply the embodying in the Revised Statutes of a provision providing for the doubling of the price of the alternate reserved sections common to nearly all the laws making grants to States and railroads.

This section, then, only fixes the price of lands when offered at public or private sale. It does not apply to pre-emption entries, to homestead entries, to timber-culture entries, to coal land entries, to mineral land entries, to timber land entries, to desert land entries, nor, in fact, to any kind of entry, excepting the original method of disposing of the public lands established by the Act of April 24, 1820. It will be found that every method of taking up public lands is regulated by distinct laws, and that section 2357 has no more reference to other kinds of entries than the laws creating the other entries have to the method of public and private sale. It is true that the pre-emption law, and the commuted homestead law adopt the prices fixed by section 2357, but it is only by virtue of the pre-

emption law and the homestead law that the section has any applicability.

Right of Recovery.

The present entry not being under the laws relating to private and public sale, but under the Act of March 3, 1877, the appellee was entitled to make entry on payment of 25 cents per acre and to make final entry and receive his patent on payment of $1 per acre additional. The record shows that he was required by the officers of the Government to make the double payment and also that the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, instructed the Registers and Receivers of the various land offices to receive $2.50 per acre for desert land entries when within the limits of a railroad grant, 50 cents per acre being charged on making entry. The appellant claims that the payment of the excess was voluntary on the part of the claimant, and that he is thereby precluded from recovering judgment for the amount overcharged. On this point also it is clear that there is no error in the decision of the Court of Claims. To make a voluntary payment possible the parties must stand on equal terms. Neither party can have it in his power to make the other suffer damage either in his person or property if he refuse to comply with the demands of the other. In this case the appellant had the property wholly in its power. The title was vested entirely in the appellant and there was no way by which the appellee could obtain the rights granted him by law except by compliance with all the demands which the officers of the United States made of him. He could not get his entry recorded in the local land office except upon payment of 50 cents per acre. A refusal to pay the extra 25 cents per acre would have resulted in a refusal to accept his application to enter the land, the land would have heen held as open to the next entry, and the next entryman would have been permitted to reclaim the land and to make the final proof and payment. For all this the appellee would have had no remedy, since the courts will not interfere by injunction with the officers of the land office in the discharge of their duties (see Johnson *vs.* Tousley, 13 Wall., 72–91). After making the entry and paying the 50 cents per acre the appellee reclaimed the land in accordance with the law, and was then confronted with an additional demand of $2 per acre instead of the $1 per acre that was due. If he refused, his entry would have been cancelled and the land awarded to the next entryman. No payment made under such circumstances, where one party was entirely in the power of the other, has ever been deemed voluntary. A case exactly similar is that of Morgan *vs.* Palmer, 2 Bour. & C., 720. In that case the mayor of a town, charged with issuing licenses, had charged a fee for so doing, without authority of law, and the payer brought suit to recover the amount paid. The defence was that the payment was voluntary, but the court held otherwise, Abbott,

C. J., saying: "It has been well argued that a payment having been voluntarily made it can not be recovered back in an action for moneys had and received. I agree that such a consequence would have followed had the parties stood on equal terms. But if one party has the power of saying to the other 'that which you require shall not be done except upon the conditions which I choose to impose' no person can contend that they stand on anything like equal footing."

A similar case is that of Steele *vs.* Williams, 8 Wels., Hurl. & Card., 625, where Baron Martin said:

"If a statute prescribe certain fees for certain services and a party assuming to act under it insists upon having more the payment can not be said to be voluntary."

Other decisions to the same effect are Astly *vs.* Reynolds, 2 Strange, 215.

"Where a man having a claim or lien to a certain amount on goods and securities in his possession, unlawfully refuses to give them up without receiving more than he is entitled to claim, or having no lien at all on them, wrongfully refuses to give them up without being paid for so doing, and the owner, in order to get the goods and securities, is obliged to satisfy and discharge the extortionate demand."

Ashmole *vs.* Wainwright, 2 Q. B., 837.
Kent *vs.* Great W. R. R. Co., 3 Com. B., 715.

Where a railway company or carrier makes excessive charges for the conveyance of goods, and the consignee in order to get possession of the goods pays the extortionate demand.

Corkle *vs.* Maxwell, 3 Blatch., 413.
Tutt *vs.* Ide, 3 Blatch., 249.

When a payment has been obtained by fraud, oppression, or extortion, or when it has been made to secure a right which the party paying was entitled to without such payment, and which right was withheld by the party receiving such payment until the payment was made, or when made upon a wrongful demand, to save the party paying from some great or irreparable mischief or damage, from which he could not be saved but by the payment of the sum wrongfully demanded, such payment is not voluntary, and the amount so paid can be recovered back.

The decisions of this court lay down the same rule. In the bank of the United States *vs.* Bank of Washington, 6 Peters, 8, the court said that:

"Where money is wrongfully and illegally exacted it is received without any legal right or authority to receive it; and the law at the very time of payment created the obligation to refund it. A

notice of intention to recover back the money does not even in such cases create the right to recover it back; that results from the illegal exaction of it, and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake."

In U. S. *vs.* Lawson, 101 U. S., 164, where a collector of customs sued for certain fees turned into the Treasury by him in response to the direction of his superiors the court said: "Still it is contended by the United States that the payments are voluntarily made, and that the money can not be recovered back. Confessedly, the order was official and peremptory, and under such circumstances it may well be inferred that the party felt that if he refused to obey, the refusal would cost him his commission. Had he refused to comply with the order or entered a protest, his act might have been regarded as contumacious, and have proved as injurious in its consequences to the incumbent of the office as if he had declined to discharge the ordinary duties of the collector. Viewed in the light of the attending circumstances, and especially of the fact that the order came from the Commissioner of the Customs, to whom he was immediately responsible, we can not hold the payments were voluntary within the meaning of the judicial rule, which, in consequence of the payment, denies to the party making the same the right to recover it back."

In the similar case of U. S. *vs.* Ellsworth (101 U. S., 170, 174) the court said, after reading sections 3617, 3619, R. S.:

"Viewed in the light of these penal provisions the payments in question, made under the peremptory order of the commissioner, can not be regarded as voluntary in the sense that the party making them is thereby precluded from maintaining an action to recover back so much of the money as he was entitled to retain. CALL IT MISTAKE OF LAW OR MISTAKE OF FACT, the principles of equity forbid the United States to withhold the same from the rightful owner."

We submit that the language and the decision of the court in the case of Swift, etc., Co. *vs.* U. S., 111 U. S., 22, is absolutely conclusive of the right of the appellee to recover the amount overcharged. The court there said that the parties were not on equal terms; that the claimant had to submit to the exaction of the officers of the Government or discontinue its business. "Money paid, or other value parted with under such pressure has never been regarded as a voluntary act within the meaning of the maxim, *voluntia non fit injuria*."

The cases in which the defence of voluntary payment has been sustained by this court, Lanborn *vs.* County Commissioners, 97 U. S., 181; Railroad Company *vs.* Commissioners, 98 U. S., 541, also show that the present case is not a case of voluntary payment. In the latter case the court held that there was no compulsion for the reason that the property of the payer was not in any immediate danger of being lost. The court said:

"The real question in this case is, whether there was such an immediate and urgent necessity for the payment of the taxes in controversy as to imply that it was made under compulsion. The Treasurer had a warrant in his hands which would have authorized him to seize the goods of the company to enforce the collection. * * * No attempt had been made by the Treasurer to serve his warrant. He had not even personally demanded the taxes from the company, and certainly nothing had been done from which his intent could be inferred to use the legal process he held to enforce the collection if the alleged illegality of the claim was made known to him."

It is unnecessary to point out in detail how essentially this tax case differed from the case in hand. That appears from the quotation we have just made. In the case at bar it does appear, affirmatively, through the order of the Commissioner of the General Land Office, that there was an immediate necessity for the payment of the amount paid on penalty of losing the rights granted by law. Accordingly the Court of Claims states in the Findings (Record, p. 9), that the appellee was *required* to make the payments. It appears from these findings also that no protest was made by the appellee at the time, and that he took no steps for relief against the demand. We have seen that there was no relief possible for him. It was useless to appeal to the Commissioner and the Secretary, since they had already decided adversely to his contention, and the double price had been charged for over a year and a half under their construction of the law. We have seen that no court would interfere by injunction, or of course, by mandamus. And in making no protest, which might have injured his standing with the Land Office, the appellee followed the law as laid down by this and other courts. Between private parties a protest may sometimes be valuable as evidence that the payment was not in fact voluntary. But it is entirely unnecessary where the situation of the parties affords sufficient evidence of itself that the payment is an involuntary one. In the case already cited of the Bank of the United States *vs.* Bank of Washington, 6 Peters, 8, the court said:

"A notice of intention to recover back the money does not, even in such cases, create the right to recover it back; that results from the illegal exaction of it, and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake." In Ogden *vs.* Maxwell, 3 Blatch., 319, it was held that illegal fees exacted by a collector, though sanctioned by a long continued usage and practice in the office, under a mistaken construction of the statute, even when paid without protest, might be recovered back, on the ground that the payment was compulsory, and not voluntary. And in Swift, etc., Co. *vs.* U. S., 111 U. S., 22, this court said:

"No formal protest, made at the time, is by statute a condition

to the present right of action, as in cases of action against the collector to recover back taxes illegally exacted; and the protest spoken of in the decision of the court as having been made prior to 1866 by manufacturers of matches and others requiring such stamps are of no significance, except as a circumstance to show that the course of dealing prescribed by the Commissioner had been deliberately adopted, had been made known to those interested, and would not be changed on further application, and that consequently the business was transacted upon that footing, because it was well known and perfectly understood that it could not be transacted upon any other. A rule of that character deliberately adopted and made known and continuously acted upon, dispenses with the necessity of proving in each instance of conformity that the compliance was coerced. This principle was recognized and acted upon in U. S. *vs.* Lee, 106 U. S., 196–200, where it was held that the officers of the law, having established and acted upon a rule that payment would be received in only a particular mode, contrary to law, dispensed with the necessity of an officer to pay in any other mode, and the party thus precluded from exercising his legal right was held to be in as good condition as if he had taken the steps necessary by law to secure his right."

The rule adopted by the Interior Department, June 27, 1887, is of the character here described. It was deliberately adopted, with the approval of the Secretary of the Interior. It was made known, having been printed and sent to the Registers and Receivers throughout the country, and having been published in the Department Decisions, Vol. 5, p. 708, and continuously followed until January 13, 1892, when, as the record shows, a change was made, and the right construction of the law resumed. A decision of the Secretary of the Interior affirming the correctness of the double charge can be seen in Vol. 9, Decisions of the Department of the Interior, p. 49, rendered July 2, 1889. It is apparent, therefore, from these facts, and from the rule laid down in the Swift case, that the appellee was under no obligation to protest against the payment when made, and as such action might have prejudiced the officers of the land office against his entry and caused them to raise objections against his final proof he was perfectly justified in paying the amount demanded without protest and in afterward bringing his suit for the recovery of the money.

It only remains to examine the dissenting opinion of Judge Nott, found on pages 15 and 16 of the record. The dissent is based on the assumptions that this is a completed business transaction; that when the Government steps into the common arena of buying or selling property it lays aside its prerogatives of sovereignty, and is ruled in its transactions by the rules which regulate the affairs of men; and when the individual deals with the Government in matters of contract he is entitled to no different rule of law than when he deals with one of his fellow men; that in these cases

of land sales the Government can not sue one set of purchasers for double the agreed price on the ground that its agent, the Commissioner of the Land Office, exceeded his lawful authority by a misconstruction of the statutes and sold the land too cheap; and that if the Government can not reopen the transaction because of the erroneous act of its agent, the claimants can not.

It is not difficult to detect the fallacy of this argument. Each one of the assumptions is contrary to the fact. There would plainly be a right of recovery between private individuals where a definite contract had been entered into for the purchase of land at a particular price and the vendor subsequently refused to give title except upon payment of an additional sum, if there were no remedy in the courts by which the vendor could be forced to fulfil his original contract. And as to the second assumption, the Government never considers itself bound by the act of its agents, unless such acts are in accordance with the law. In the cases where lands have been sold by the Register and Receiver at less than the legal price, or without the formalities prescribed by law the sales have been set aside either by the courts, or by the Department itself. In the case of Eldred *vs.* Sexton, 19 Wall., 189–198, the sale was held to be void because the lands had not first been offered at public sale, as required by law, and in the following cases where double minimum lands have been sold for the minimum price the Commissioner has called upon the entrymen for the additional sum, and in default thereof, has cancelled the entry. (Moses Stern, p. 1393, Vol. 2, Copp's Land Laws; Harvey J. Judd, p. 507, Public Land Decisions, Vol. 6; Charles P. Bedell, p. 495, Public Land Laws, Vol. 7; Henry McCrea, p. 578, Public Land Laws, Vol. 7.) The only reason why the Government could not sue in court for the additional purchase price is because in none of the land laws does an entryman make a contract for the purchase of the lands. He does not agree to purchase them. He simply declares his intention to comply with the laws. If he does, he obtains title to the land. If he does not comply, he loses his rights. But in no case is he bound either by law or contract either to prove up or to make the payment provided for in the law. It is for this reason and not because the Government is estopped by the acceptance of a certain sum by its officers, that the Government could not have sued the appellee in this case, if the circumstances had been reversed.

The whole of the dissent seems to be based on the ground that the Commissioner and the claimant had entered into a regular contract for the purchase and sale of this land at the agreed price of $2.50 per acre. But there is no ground whatever for such reasoning. The Act of March 3, 1877, is the only contract in the case. The Commissioner had no power or authority to contract for a higher sum than that fixed by law, even if the land was worth much more. Congress has not for many years attempted to sell the public lands for the highest price that could be obtained;

the settlement of the country, and the creation of homesteads has long been the principle object of land legislation. The revenue to be derived is an inferior consideration. If the action of the Commissioner in this case were to be sustained, there would seem to be no reason why the Commissioner could not defeat the whole intention of Congress in enacting liberal laws simply by charging whatever he could get for the public lands, without regard to the price fixed by law.

In conclusion we hold that there is nothing in the case at bar that has the appearance of a voluntary payment.

When controversies between persons standing upon equal footing are settled out of court such controversies can not be renewed in court. If in such cases money be demanded and paid, the demandee can not base a claim in court upon the fact that no consideration passed from the demandor to him, because upon his own showing in such a case, the payment of the money was purely voluntary and without any obligation of payment on his part, so that the demandor has title by gift.

When public officers, who are by law required to perform certain duties for the benefit of the people, demand as a condition for the performance of such duties the payment of money in excess of that prescribed by law, the payment of such excessive demand, in order to secure the performance of such duties, is not a settlement out of court of a controversy between parties standing on an equal footing. On the contrary it is a creation of a controversy by usurpation of power, which can only be settled in court. All courts, with one voice in such cases, affirm that there must be restitution of the money illegally demanded. It is plain that nothing can be more destructive of justice than to permit public officers, wielding great powers, to make and enforce upon the people illegal demands for the payment of money.

The case at bar shows conspicuous wrong and injustice. The public lands are the heritage of the people. They belong to the people on the terms prescribed by law. When public officers, in possession of these lands in trust for the people, require and compel the people to pay double the price fixed by law for such lands, such usurpation of power must and ought to be ended by the courts.

It is believed that this is the first case before this court in which it appears that ministerial officers have demanded and enforced double payment for public lands.

There can be no doubt that the appellee is entitled to the restitution of the $799 illegally demanded and received by appellant's agents for the use of appellant.

HARVEY SPALDING,
Attorney for Appellee.

Office Supreme Court, U. S.
FILED.
OCT 16 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1895.

THE UNITED STATES, *appellant*,
v.
BENJAMIN HEALEY. } No. 378.

Reply to Brief and Argument for Appellant.

Twenty months ago counsel for appellant delivered an exhaustive argument in this case, then in the Court of Claims. In the expectation that it would be submitted in this court early last session under the 20th rule a brief was prepared for appellee in advance. The brief for appellant having now been made preparatory to the oral argument of the case on the 21st of October of this term, this brief reply is made thereto.

Two distinct defenses opposed to each other were made in the court below and the same defenses are now made in this court and each supported by the same line of argument. The first defense affirms that the price paid for the lands by appellee, viz: $2.50 per acre, was the legal price thereof under the desert land act of March 3, 1877, by complying with the terms of which the appellee secured title.

The second defense is that the appellant has title to the $799, exacted and secured of appellee in excess of the price prescribed for desert lands under the act of March 3, 1877, by gift.

A title to the fund by full consideration paid denies the title claimed by gift, and the title claimed by gift denies the title claimed by full consideration paid.

When, therefore, the learned counsel make both these defenses, each of which antagonizes the other, it is equivalent to an admission that they are unable to rely on either.

Claim of Title to the Fund by Full Consideration Paid is Refuted by the Statute Itself.

Appellee's title to the land was acquired under the desert land act of March 3, 1877. A title under that act could only be acquired through several successive steps. First, it had to be shown that the land was desert land. Second, the entry fee prescribed by the law had to be paid. Then the land had to be reclaimed by the entryman and proof made thereof. Then the final payment had to be made. In contemplation of the law all these steps and proceedings were to occupy three years. In no other statute was there any one of the provisions contained in the desert land act. The price fixed for all desert lands within the States and Territories named was twenty-five cents per acre entry fee, and one dollar per acre final payment upon proof of reclamation. No other statute permitted the entry of 640 acres of land or permitted the entry of any land upon payment of twenty-five cents per acre, or provided a term of occupancy of three years for an entryman and a consummation of title after three years of occupancy. Not one of the various acts had and done on the part of the appellee and on the part of appellant which constitute the transaction out of which this controversy arose was possible under any statute save that of March 3, 1877, providing for entry and reclamation of desert lands. The exaction by appellant's agent made upon appellee for the payment of fifty cents an acre for entry of the land and of two dollars additional after reclamation for the final receipt, without which he could not obtain title, stands out as a bold violation of the explicit terms of the law. There never has been a statute which authorized a demand of fifty cents per acre of an entryman of public lands and of two dollars per acre after compliance with certain conditions as a final payment. The demand made was therefore not only in open violation of the explicit terms of the desert land act, but of every other land law in the sense that no law authorized such a demand.

But the learned counsel have with great labor invoked the proviso of Section 2357, R. S. And the reason no doubt is that by no other law, unless perhaps, as to mineral lands, is two dollars and fifty cents per acre made the price of public lands. This proviso is a law of 1874, at which date desert lands were unknown to the law. But the law of 1874 made the price of lands to which it applied two dollars and a half per acre payable only in one sum. That law did not authorize an entry fee of fifty cents per acre and a final payment of two dollars per acre. By the act of 1874 the two dollars and fifty cents was not divisable at all. In the very nature of the case the proviso of 1874 never applied to any desert lands. It is simply impossible through the courts to thrust into the desert land act of 1877 that which the law-making power excluded, namely, the proviso of 1874, and thrust out of that act the provision

put into it in 1877 by the law-making power, namely, the provision giving the right of entry to any citizen of any desert lands in the States and Territories named in the law by the payment of twenty-five cents per acre and the right to a title thereto upon proof of reclamation and the payment of the additional sum of one dollar per acre.

The Defense of Title by Gift is Refuted by the Facts.

There can be no title by gift except by the free and voluntary act of the donor. Such a defense in this case affirms that the demand of appellant's agents made in manifest violation of law and of public policy was the act of appellant, that is, the Government of the United States, and places the United States in the position of extorting money from a citizen with no consideration therefor, by violating its own laws and its own public policy. By public policy every unauthorized, unlawful act of Government agents is disavowed. It is plain that the United States can assert no title to money secured from citizens by the unlawful acts of its agents.

For more than ten years the plain provisions of the desert land act of 1877 as to price to be paid by entrymen was complied with. Fifty cents per acre and two dollars final payment was first ordered on June 27, 1887.

The act of 1877 is incapable of misconstruction, because the price of the lands are explicitly stated, and can not be misunderstood. Both parties knew the law and knew the facts when the illegal demand was made.

If the United States, by the courts, can be permitted to profit by the violation of its laws and of its public policy by its agents, then the position of the appellee as to his rights and to the law and to the agents of appellant is to be considered.

Was the $799 in excess of the prices fixed in the act of 1877 paid to appellant's agents so paid by a purely voluntary act of the appellee? He knew the law fixed the price at $1.25 per acre, and he knew that for more than ten years that had been the undeviating price at which all such lands had been disposed of. It thus appears as a conclusive fact in the case that he would never have paid double the legal price, unless he deemed himself compelled to do so. It is plain that he was so compelled, for had he refused to pay the fifty cents entry fee demanded he would have lost his statutory right to enter the land. In fact, such was the position of power of the agents of appellant that his only means of entry was by submitting to the illegal demand. And when he had reclaimed the land there was no escape from the illegal demand made upon him for the payment of two dollars per acre, for the position of appellant's agents was such that he had no means of perfecting his title to the land except by submitting to the illegal demand. Thus, it is shown that there is not a single fact or circumstance upon